No. 431

IN THE

Supreme Court of the United States

OCTOBER 1943 TERM

VINCENT RAYMOND DUNNE, JAMES P. CANNON, EDWARD PALMQUIST, MAX GELDMAN, OSCAR COOVER, EMIL HANSEN, ALFRED RUSSELL, GRACE CARLSON, HARRY DEBOER, FARRELL DOBBS, FELIX MORROW, KARL B. KUEHN, JAKE COOPER, CARLOS HUDSON, CARL SKOGLUND, ALBERT GOLDMAN, CLARENCE HAMEL and OSCAR SCHOENFELD,

Petitioners,

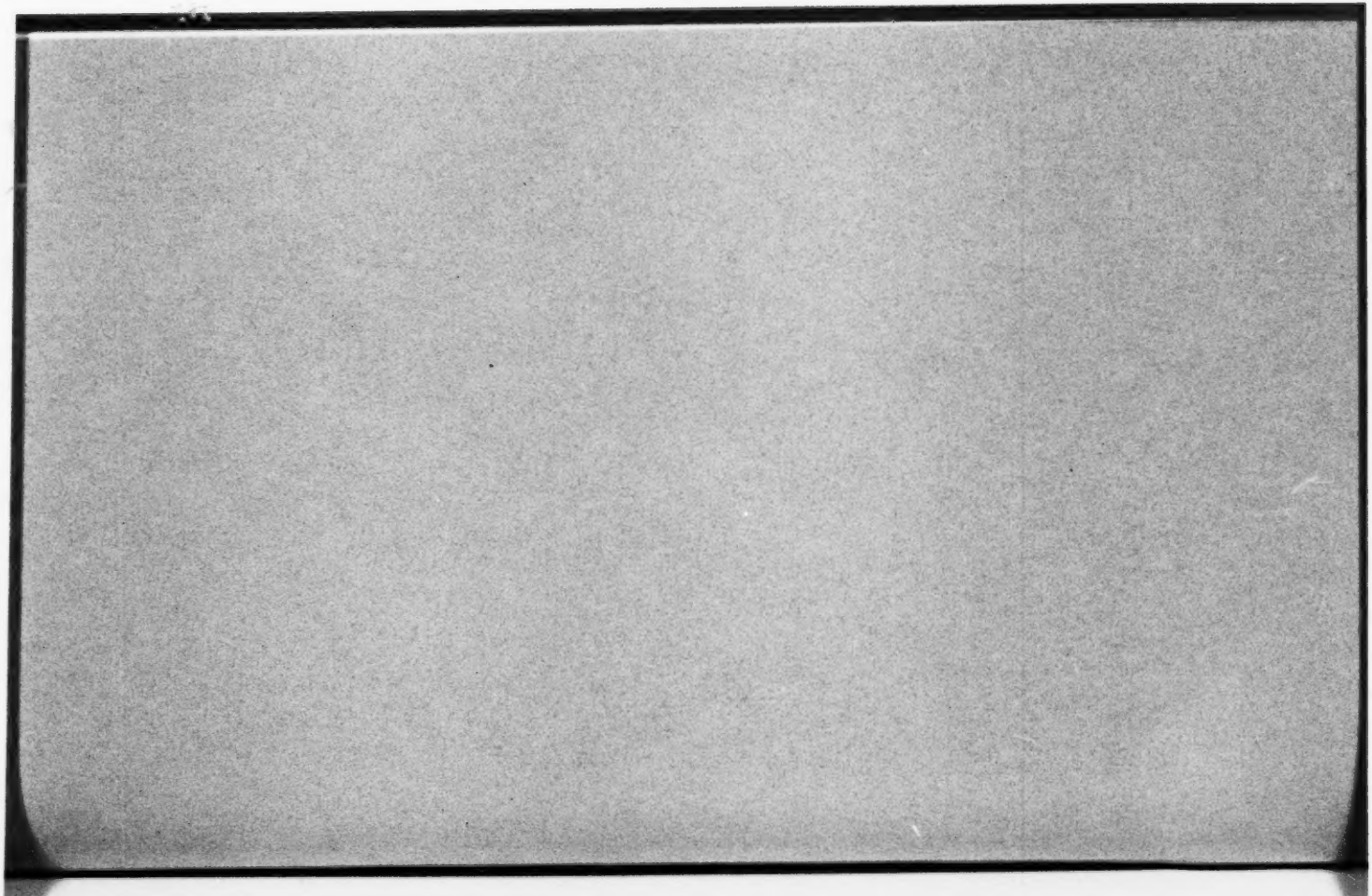
against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

OSMOND K. FRAENKEL,
ALBERT GOLDMAN,
Counsel for Petitioners.



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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Vincent Raymond Dunne, James P. Cannon, Edward Palmquist, Max Geldman, Oscar Coover, Emil Hansen, Alfred Russell, Grace Carlson, Harry DeBoer, Farrell Dobbs, Felix Morrow, Karl B. Kuehn, Jake Cooper, Carlos Hudson, Carl Skoglund, Albert Goldman, Clarence Hamel and Oscar Schoenfeld, respectfully pray:

That a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Eighth Circuit affirming the judgment of the District Court of the United States for the District of Minnesota convicting petitioners of a violation of United States Code Title 18 §§9, 10 and 11.

Summary Statement

Petitioners were charged, in two counts, with having conspired to violate United States Code Title 18 §6 and United States Code Title 18 §§9, 10 and 11. They were acquitted of the charge contained in the first count which related to §6, the seditious conspiracy statute (35 Stat. 1089). They were convicted under the second count which was based on Title 1 of the Alien Registration Act of 1940 (54 Stat. 670). Section 11 of that statute punishes conspiracies to commit the acts prohibited by other sections of the law. The indictment here involved drew into question §§9 and 10. The first of these punishes anyone who advises or in any way causes insubordination in the armed forces in the United States; the second punishes anyone who advocates the overthrow of the Government by force. The sections are set forth in full in the appendix (pp. 27, 28).

Defendants demurred to each count of the indictment as insufficient in law, on the ground that the statute on which it was based was unconstitutional (R. 19-31). The demurrer was overruled and an exception allowed (R. 32).

Before the commencement of the trial the defendants filed a motion calling upon the Court to determine certain constitutional questions or, in the alternative, to order the jury to determine the same (R. 32-36). This application was denied and an exception allowed (R. 56).

Among the matters to which the Court's attention was directed, both in the demurrer and in the motion, was the applicability to this case of the "clear and present danger" rule. The same matter was called to the Court's attention at the end of the Government's case on motion for a directed verdict (R. 827, 829), which was followed by elaborate argument (R. 830-853). During the course of this argument, Mr. Schweinhaut, who was of counsel for the Government, stated that it was his opinion that the clear and present danger rule had no application to the case at all (R. 844).

The motion was denied, except as to five persons originally named as defendants, with an oral opinion (R. 854-856), and an exception noted on behalf of the other defendants (R. 857). The motion for a directed verdict was renewed at the end of the entire case on the same grounds, denied and an exception taken (R. 1129). Defendants also asked the Court to instruct the jury that there could be no conviction unless the jury found the existence of a clear and present danger (Requests Nos. 14, 15, R. 1132-1134). The Court refused to give these instructions and an exception was noted (R. 1143).

The various points heretofore discussed were all preserved in the assignments of error filed, particularly assignments Nos. 1, 2, 6 and 7 (R. 1274, 1279).

A large part of the trial was, of course, concerned with the question of defendants' guilt under the first count of the indictment, a question which, to some extent, involved considerations the same as those relating to the charge under the second count that defendants had conspired to advocate the overthrow of the Government by force. The Government proceeded almost entirely on the theory that proof of the defendants' guilt was established by proof of their membership in and activities in connection with the Socialist Workers Party. In an attempt to show that the defendants conspired to overthrow the Government by force, the Government introduced in evidence literature issued by the Socialist Workers Party or found in its headquarters, and also the testimony of witnesses about public speeches and private statements allegedly made by some of the defendants.

Although the defense challenged and denied the testimony of the Government's witnesses, the basic facts were undisputed. The existing disputes resulted from differences in interpretation of the documents published and the policies pursued by the party.

The Socialist Workers Party was organized at a convention held in Chicago, Illinois, from December 28, 1937

to January 1, 1938 (R. 861) at which was adopted a Constitution and Declaration of Principles (Government's Exhibit 1, set forth in full at R. 1176-1219) which is admittedly based on the teachings of Karl Marx, Frederick Engels, Nikolai Lenin and Leon Trotsky. At a special convention called in December, 1940, this Declaration of Principles was suspended; its circulation was then discontinued (R. 870, 903).

At the time of the trial the party had approximately 2,000 members (R. 931, 954) belonging to some thirty branches in different sections of the country, the three largest branches being in New York, Minneapolis and Chicago. The branches held meetings at which subjects of current interest were discussed, primarily from the point of view of the party (R. 891). Whenever and wherever possible the party has participated in election campaigns.

A National Committee of about twenty-five members, elected at a party convention, has charge of the functioning of the party during the intervals between conventions. In turn, it designates a small number (about seven) to act as members of a Political Committee, to manage the affairs of the party between sessions of the National Committee (R. 954).

New members are admitted to the party on application with the recommendation of two members and acceptance by the branch involved. They promise to accept the principles of the party and abide by its decisions (R. 1213-1214).

The party carried on its propaganda by the publication and sale of a weekly paper, *The Militant* (formerly the *Socialist Appeal*), and of a monthly magazine, the *Fourth International* (formerly the *New International*). The circulation of the weekly paper was about 15,000, and of the monthly magazine about 4,000 (R. 914). In addition, the party sold about 5,000 to 10,000 copies of the Declaration of Principles until its suspension in December, 1940, and published and sold various pamphlets (R. 914).

The Government proved that all of the defendants had been members of the Socialist Workers Party prior to

June 28, 1940, the date of the enactment of the Alien Registration Act of 1940, on which the judgment of conviction rests. Membership after that date was admitted by some of the defendants, disputed with regard to others, and completely unproven as to the rest. Almost all of the literature on which the Government based its case was published or distributed prior to the effective date of the statute in question.

Defendants in their motion for a directed verdict, directed the Court's attention to this phase of the case, claiming that the evidence was insufficient to show the existence of any conspiracy after the enactment of the statute, or the participation in that conspiracy of particular defendants. The same matter was also called to the Court's attention in requests to charge, particularly Nos. 12 and 13 (R. 1132) and No. 18 (R. 1134), which were refused and exception noted (R. 1143). These questions also were preserved in the assignments of error, particularly Nos. 2, 3, 4 and 9 (R. 1276-1281). It is significant in this connection to note also that the only reference in the lengthy charge of the Court to this important issue was the following:

> "And as to Count 2 it must be proved that they were members after June 28, 1940" (R. 1166).

Nothing was charged as to the necessity for finding that an unlawful conspiracy had been entered into after the enactment of the statute, and the jury no doubt was misled by the statement that if the jury found that the defendants conspired to impair the loyalty of the armed forces, they must be convicted (R. 1166)—without any caution that such conspiracy must be found to have been in existence after the enactment of the law.

The nature of the evidence relied upon by the Government to show the advocacy of unlawful overthrow of the Government and the promotion of disaffection in the armed forces will be discussed more fully in the accompanying brief.

The Circuit Court of Appeals, after holding the case for nearly ten months, unanimously affirmed the convictions in an opinion by Circuit Judge Stone. The Court held the statute constitutional, found the indictment sufficient and the clear and present danger rule inapplicable. It concluded that there was sufficient evidence of the existence of a conspiracy after the enactment of the act, and that the evidence connected each one of the convicted defendants with the conspiracy after that date. The Court did not discuss the instructions to the jury.

Jurisdiction

This Court has jurisdiction under Judicial Code §240 Subdivision "a". This application is timely since the decision of the Circuit Court of Appeals was rendered on September 20, 1943.

The opinion of the Circuit Court of Appeals has not been officially reported. It appears in the record at pages 1316 to 1344.

Questions Presented

1. The first question is whether or not §§9, 10 and 11 of the Alien Registration Act of 1940 operate as an unwarranted threat to freedom of speech, press and assembly in violation of Article 1 of the amendments to the Constitution of the United States.

2. The second question is whether the statute as applied violates Article 1 of the amendments to the Constitution because the facts proved failed to show the existence of any clear and present danger of the happening of the substantive evils which Congress sought to prevent and the Trial Court refused to permit the jury to pass on this issue.

3. The case also presents the question whether an indictment under this statute is sufficient when it merely repeats the words of the statute and fails to set forth the writings relied upon or any other facts showing the commission of a crime.

4. Finally, the case presents the question whether there was sufficient evidence to permit a conviction. This question falls into three parts: the first, whether the material relied upon by the Government to prove advocacy of forceful overthrow of the Government after the enactment of the statute is susceptible of such interpretation beyond a reasonable doubt; the second, whether there was any evidence of conspiracy to cause insubordination in the armed forces; the third, whether there was evidence sufficient to fasten guilt upon particular defendants, either by reason of their membership in the Socialist Workers Party after the enactment of the statute, or their knowledge that the aims of the Party were illegal.

Reasons Relied Upon for the Allowance of the Writ

1. There are here presented for decision several important questions of Federal law which have not been, but should be, settled by this Court, some questions which have been decided in a way probably in conflict with applicable decisions of this Court and some which are in conflict with decisions of other Circuit Courts of Appeal in the same matter.

2. This Court has never been called upon to pass upon the validity of a peacetime sedition statute. Indeed, this is the first time in our history since 1798 that such a statute has been enacted. While the constitutionality of the earlier law was never passed upon by this Court, it is well known that Thomas Jefferson believed it to be unconstitutional. Surely this Court should now hear argument on the important subject involved.

3. The applicability of the clear and present danger rule to a statute of this character is of the greatest importance. This Court in *Schenck* v. *United States,* 249 U. S. 47, held the test applicable to §3 of the Espionage Act (40 Stat. 219, 50 U. S. C. 33, 34). Section 9 of Title 18 of the U. S. Code is substantially identical with that section of the Espionage Act. The clear and present danger rule should, therefore, have been applied to so much of the case as rested on §9 and the refusal of the lower Courts to do so is in conflict with the law as laid down in this Court in the *Schenck* case and many others to which we will refer in the accompanying brief.

Moreover, by the recent decisions of this Court, the clear and present danger test is the "minimum" protection afforded to expression of opinion (see *Bridges* v. *California,* 314 U. S. 252). The Circuit Court of Appeals rested its decision upon *Gitlow* v. *New York,* 268 U. S. 652. While that case has never been overruled by this Court, the question is here presented whether it is applicable or whether the concurring opinion of Justices Brandeis and Holmes in *Whitney* v. *California,* 274 U. S. 357, does not correctly represent the law. Namely, that regardless of a legislative declaration that certain words are dangerous, a defendant in a particular case always has the right to a determination by the Court or by the jury that under the circumstances of his case no clear and present danger existed. See in this connection also *Schneiderman* v. *United States,* 319 U. S. ....., and *Taylor* v. *Mississippi,* 319 U. S. .....

4. The Circuit Court of Appeals for the Eighth Circuit in deciding that the indictment is sufficient has decided an important question of Federal law contrary to decisions of this Court and in conflict with decisions of other circuits. See *United States* v. *Hess,* 124 U. S. 483; *Collins* v. *United States,* 253 Fed. 609 (9th Cir.); *Asgill* v. *United States,* 60 F. 2nd 780 (4th Cir.).

5. The decision that the evidence relied on by the Government is sufficient to justify the finding of guilt beyond a reasonable doubt presents an important question never before decided by this Court. Substantially the question whether the Socialist Workers Party advocates the overthrow of the Government by force is the same as whether the Communist Party so advocates. This latter question was recently before the Court in the *Schneiderman* case, *supra*. At that time the Court did not feel it necessary to reach a decision. In the case at bar the question is presented under a slightly different aspect. Its importance cannot be doubted.

6. There is also the question whether the evidence, particularly in the light of the Court's charge, justified a conviction of any or all of the defendants, in view of the fact that the statute under which they were convicted was enacted only in June, 1940, and the great bulk of the evidence, most of which was introduced as relevant under the first count, dealt with matters which preceded that date. The right of a person not to be convicted for acts committed prior to the enactment of a criminal law is fundamental and is specifically guaranteed by the Constitution. It should not be whittled away by presumptions or inferences. The question to be presented here is of the first importance in the administration of American justice.

7. There is finally the question whether there is sufficient evidence to justify the conviction of various of the defendants even though it appears that their membership in the Socialist Workers Party continued after the enactment of the statute in June, 1940, in the absence of any evidence that they interpreted the program of the Party as advocating the violent overthrow of the Government or any other unlawful act. See *Schneiderman* v. *United States*, *supra*.

WHEREFORE, it is respectfully prayed that a writ of certiorari be issued out of the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and it is further prayed that the order of said Circuit Court of Appeals for the Eighth Circuit affirming the judgment of conviction of the District Court for the District of Minnesota be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioners will ever pray.

Dated, October 14, 1943.

VINCENT RAYMOND DUNNE, JAMES P. CANNON, EDWARD PALMQUIST, MAX GELDMAN, OSCAR COOVER, EMIL HANSEN, ALFRED RUSSELL, GRACE CARLSON, HARRY DEBOER, FARRELL DOBBS, FELIX MORROW, KARL B. KUEHN, JAKE COOPER, CARLOS HUDSON, CARL SKOGLUND, ALBERT GOLDMAN, CLARENCE HAMEL and OSCAR SCHOENFELD,

By OSMOND K. FRAENKEL and ALBERT GOLDMAN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION

Statement

The basic facts are set forth in the foregoing petition. So far as may be necessary, further facts will be discussed in connection with the argument.

Argument

POINT I

The statute upon which the conviction rests is unconstitutional as denying freedom of speech.

The indictment charged petitioners with a conspiracy to violate two separate sections of the statute, §§ 9 and 10. The first of these punishes the fomenting of disaffection in the armed forces; the second, the advocacy of the overthrow of the Government by force. They require separate consideration.

Disaffection in the armed forces

This provision of the statute is substantially identical with § 3 of the Espionage Act (40 Stat. 219, 50 U. S. C. 33). That statute has, of course, been upheld by this Court in various decisions beginning with *Schenck* v. *United States,* 249 U. S. 47. However, it must be borne in mind that the Espionage Act is applicable only during a time of war, whereas the present statute is applicable regardless of a state of war. The impact of war upon the validity of the statute was recognized by Mr. Justice Holmes when he said:

> "When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long

as men fight and that no court could regard them as protected by any constitutional rights" (249 U. S. at 52).

The Circuit Court of Appeals was of the opinion that the circumstance that the earlier statute was a wartime statute was immaterial, particularly in view of the fact that the present statute was enacted "on the brink of war, and to correct existing dangers". We respectfully submit that the distinction between peace and war is still a vital one and that the validity of the new statute is one which should be fully explored before this Court in argument.

In this connection we wish to call the Court's attention to Prof. Chafee's analysis of the decisions under the earlier statute and his conclusion of the harmful character even of that law during war time. (See Free Speech in the United States, 51-53, 94, 461.) He pointed out that the earlier statute was enforced in such a manner as to throttle discussion and concluded that this throttling of discussion during the war had a serious and perhaps decisive effect upon the attitude of public opinion in connection with the peace. (See pages 561 and following.) Whatever may be said about the propriety of restricting discussion during wartime there can be no justification for such restrictions in the period before the war. It is of the utmost importance that the fullest freedom of discussion be permitted during a period when it becomes apparent that the question of war or peace will be an important one. The statute at bar is a threat to such freedom of discussion, of the same general kind as was condemned by this Court in *Herndon* v. *Lowry,* 301 U. S. 242, and *Thornhill* v. *Alabama,* 310 U. S. 88.

Forcible overthrow of the Government

This Court has, of course, upheld state statutes similar to the statute here in question. See *Gitlow* v. *New York,* 268 U. S. 652, and *Whitney* v. *California,* 274 U. S. 357. But in dealing with these statutes this Court was limited to

a consideration of the question whether or not they violated the due process clause of the Fourteenth Amendment. Here this Court is concerned with the more direct question whether the Congressional enactment violates the First Amendment's absolute prohibition against "abridging" freedom of speech or of the press. This Court has never been called upon to consider that question.

It should be borne in mind, moreover, that the statute is not limited either to conditions of war or to circumstances of a clear and present danger, a question which will be discussed in the succeeding point. Moreover, Subsection 3 of § 10 punishes mere membership in an organization which advocates the proscribed doctrine. Thus one may be punished for the acts and beliefs of another. This Court has repeatedly held that that cannot be done. See *deJonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359; *Schneiderman* v. *United States*, 319 U. S. .

POINT II

The statute as applied is invalid because there was no evidence of the existence of any clear and present danger of the forcible overthrow of the Government.

As we have already pointed out, petitioners sought to have the Trial Court apply the clear and present danger test by motion before trial, by motions at the end of the Government's case and at the end of the entire case, and by requests to charge. In the argument on the motion to dismiss, the Government's representative at the trial said:

> "It is not the contention of the government that there was a clear and present danger that these defendants could have succeeded in overthrowing the government by force. It is our contention that under the law it is not necessary to show that there was a clear and present danger of the success of their undertaking" (R. 844).

The Trial Court expressed the opinion that Congress had given cognizance to "clear and present dangers" (R. 854). The Circuit Court of Appeals thought the question governed by the *Gitlow* case, 268 U. S. 652.

We submit that the *Gitlow* case is not applicable to § 9 of the statute in question, a point urged on the Circuit Court of Appeals which it did not discuss. Moreover, we believe that this Court has departed from the view announced in the *Gitlow* case and has shown an indication of accepting the views expressed in the concurring opinion of Justices Brandeis and Holmes in *Whitney* v. *California*, 274 U. S. 357 at .....

Certainly the clear and present danger test has been stressed in all of the recent decisions of this Court culminating with the statement in *Bridges* v. *California*, 314 U. S. 252, that it constitutes the minimum protection to freedom of expression. And in *Schneiderman* v. *United States*, 319 U. S. , Mr. Justice Murphy, speaking for a majority of the Court, pointed out the difference between agitation calling for violent action "which creates a clear and present danger of public disorder or other substantive evil" and advocacy even of the use of force under hypothetical conditions at a future time. And in making that statement Mr. Justice Murphy expressly relied upon the concurring opinion in the *Whitney* case above referred to.

Indeed, in *Taylor* v. *Mississippi*, 319 U. S. ....., this Court unanimously reversed a state court conviction under a statute which punished words "designed to encourage violence" on the ground that no clear and present danger was threatened.

It is significant, moreover, that even before the last two cases cited were decided by this Court the Court of Criminal Appeals of Oklahoma reversed convictions under that State's Criminal Syndicalism Act because the clear and present danger test had not been applied in the prosecution. In *Shaw* v. *State*, 134 P. (2nd) 999, the Court said at page 1019:

"It is our conclusion that the Legislature in the first instance has found that certain utterances by their very nature threaten the existing government. That notwithstanding this legislative declaration, especially in view of decisions of the Supreme Court of the United States, hereinabove cited, that a defendant being tried on a charge of being a member of an organization advocating criminal syndicalism has a right to have submitted to the jury as a question for their determination whether the principles alleged to have been advocated by the organization are such as to present a real and imminent danger of violence, sabotage or unlawful acts against our government. * * * The jury should have been instructed that they must find beyond a reasonable doubt. * * * that such advocacy was likely to result within the immediate future in the commission of serious violence or other unlawful acts for the purpose of bringing about political or industrial change or revolution by such means."

See also *Klapprott* v. *State*, 127 N. J. L. 395.

We believe that the above quotation substantially represents the law implicit in the recent rulings of this Court, which should now be made explicit in the pending case. In the case at bar it is conceded that there was no evidence justifying a conclusion that there was any clear and present danger that petitioners could have brought about the overthrow of the Government by force. Consequently there was no constitutional justification for any prosecution for a conspiracy to overthrow the Government by force and the motion to dismiss should have been granted.

It is true that the Government did not concede a similar absence of evidence of a clear and present danger on the other aspect of the case, namely, the question of causing insubordination in the armed forces (R. 844, 845). Hereafter we shall argue that there was no evidence either of a conspiracy to cause disaffection or of clear and present danger that such disaffection could have resulted. Here we shall merely urge that as to this phase of the case the

clear and present danger rule was applicable even under the decision of the *Gitlow* case. For subd. 1 of § 9 punishes causing of insubordination in the armed forces in language almost identical with subd. 2 of the third section of the Espionage Act. That punishes anyone who

> "shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States."

Subdivision 1 of the present statute makes it unlawful for anyone

> "to advise, counsel, urge or in any manner cause insubordination, disloyalty, mutiny or refusal of duty by any member of the military or naval forces of the United States."

We submit that both of these sections punish a substantive evil rather than a specific type of utterance. The criminal syndicalism laws discussed in the *Gitlow* and *Whitney* cases and the provisions of § 10 of the statute involved in the case at bar are statutes of the latter type. Whatever may be the view of this Court as to the survival of the rule of the *Gitlow* case we submit that as to the prosecution under § 9 the rule of the *Schenck* case is clearly applicable.

If we are correct on either aspect of the case the judgments of conviction cannot stand. For the verdict of guilty was a general one (R. 72-74). It is impossible, therefore, to tell whether it was based on § 9 or on § 10. In such a situation a judgment of conviction cannot stand. (See *Stromberg* v. *California,* 283 U. S. 359).

POINT III

The indictment is in the words of the statute which is too general to inform a defendant of the nature of the accusation made against him. The ways and means alleged in the indictment for the consummation of the conspiracy cannot be considered as part of the charging section. If they can they are too general and vague to make the charging section sufficient in law.

The charging section of the second count of the indictment is in the exact words of the statute. It adds that "the said Defendants and co-conspirators would, and they did, attempt to carry out and accomplish said conspiracy in the manner set out at numbered paragraphs One to Thirteen, inclusive, in the first count of this indictment" (R. 12).

This Court has held that an indictment in the language of the statute is not sufficient unless the statute itself is so clear and specific that the mere adoption of the statutory terms in the indictment apprises the defendant of the precise nature of the offense with which he is charged. *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Simmons*, 96 U. S. 360.

It is difficult to see how it can be contended that the statute involved in this case is so clear and specific that an indictment limiting itself to the language of the statute would be sufficient. It seems to be clear that the statute could not be any more general than it actually is.

Government counsel argued, and the Circuit Court of Appeals in its opinion adopted that argument, that the statute is sufficiently specific so that an indictment in its language is sufficient. And even if that were not so, the second count of the indictment incorporated by reference the means and methods, enumerated in the first count, by which it was alleged the petitioners intended to use or did use in carrying out the conspiracy. These ways and means, it is contended, made the charging section sufficient in law.

The answer to the last argument is two-fold. In the first place the enumeration of means and methods intended to be used or that were used to consummate the conspiracy cannot support a defective charge of conspiracy. *Asgill, et al.* v. *United States,* 60 F. (2nd) 780 (C. C. A. 4th).

In the second place the means and methods enumerated in the indictment (these are printed in the Appendix, pp. 28-32) are either not applicable to the second count upon which the petitioners were convicted or are just as general and vague as the charging section of the indictment.

There is practically nothing in the "ways and means" section of the first count (R. 7-10), which was incorporated by reference in the second count (R. 12) as to how the defendants were to advocate the overthrow of the Government by force or how they were to create insubordination in the armed forces. None of the documents or the papers of the party is mentioned. From the wording of the indictment it is quite justifiable to conclude that all the defendants did was to get together in some room and say, "Let's advocate the overthrow of the Government by force and let's cause insubordination in the armed forces", and then dispersed.

POINT IV

The evidence is insufficient to support the verdict.

(a) It does not show that the petitioners conspired to advocate the overthrow of the Government by violence.

(b) It does not show that the petitioners conspired to cause insubordination in the armed forces.

(c) It does not show that the petitioners had knowledge of the nature of the conspiracy, that is, that petitioners interpreted the program of the Socialist Workers Party to mean that it advocated the overthrow of the Government by force and the causing of insubordination.

(d) It does not show that certain of the appellants were parties to the alleged conspiracy after enactment of the statute.

A. Advocacy of violence.

To prove that the defendants conspired to advocate the overthrow of the Government by violence the Government had recourse to two types of proof: one consists of statements which, according to witnesses for the Government, were made by some of the defendants on various occasions; the other type is documentary in nature, consisting of resolutions, declarations, articles or excerpts therefrom, found in the press of the Socialist Workers Party, and pamphlets and books or excerpts of the same published for the party or found in its headquarters in either Minneapolis or St. Paul.

Petitioners contend that a consideration of all the documentary evidence, especially the official Declaration of Principles and the pamphlet *What Is Socialism,* written by the petitioner Albert Goldman, clearly indicates that the Socialist Workers Party does not *advocate* but *predicts* that the social revolution will be accompanied by violence. Such violence will be organized by the capitalist minority determined to prevent the establishment of a socialist regime by the majority of the people.

The Government can at best make out a case for the advocacy of violence to overthrow the Government by taking a few quotations out of the more than two hundred exhibits introduced into evidence. The Socialist Workers Party, during the three years covered by the indictment, issued a weekly paper more than 150 times and a monthly magazine more than 40 times and several dozen pamphlets. Out of all this material there are about ten excerpts which the Government introduced into evidence and which deal directly or indirectly with the question of violence as a method for the ushering in of socialism. There are many exhibits referring to violence, but upon examination it will be seen

that they refer to *defensive* violence against fascist or other anti-labor organizations prior to the time when the masses will gain power.

Among all the exhibits there is only one which in reality can be said to declare in so many words that the overthrow of government (not of the Government of the United States, but of all "existing social conditions") can be attained only by force. This is an excerpt taken from the *Communist Manifesto,* written in 1848 by Karl Marx and Frederick Engels. The book itself was introduced as Government's Exhibit 74 and the excerpt referred to is 74-A (R. 352).

In the case of *Schneiderman* v. *United States,* 319 U. S. ....., this Court considered that very excerpt and arrived at the conclusion for which the petitioners contended throughout the trial and in their brief to the Circuit Court of Appeals. This Court held that the *Communist Manifesto* must be interpreted in the light of the conditions prevailing at the time it was written. It also took cognizance of the fact that Karl Marx, the chief author of the Manifesto, subsequently concluded that in England, where democracy prevailed, the social revolution could be achieved in a peaceful manner.

It is only by taking out a few excerpts from the official documents of the party that a case can be conceivably made out for the proposition that the Socialist Workers Party advocates the overthrow of the Government by violence. In the same way could it be contended that Christ came not to bring peace but a sword and to "set a man at variance against his father and the daughter against her mother".

When the official documents and the writings of the responsible leaders of the party and of recognized Marxists are considered in their totality, the conclusion is inescapable that Marxism and the Socialist Workers Party, the program of which is based on the teachings of Marxism, only *predict* that the social revolution will be accompanied by violence and do not advocate violence.

The Trial Court should have so instructed the jury.

Moreover, there was no evidence that any of the material on which the Government bases its case was distributed by the Party after the date of the statute. It is true that the pamphlet "What is Trotskyism" (Exhibit 36, R. 261-267) was published after that date. But this pamphlet was not written by any of the defendants and there is no evidence that any of the defendants had anything to do with its publication or that they were acquainted with its contents. It is significant that it was not printed but only mimeographed and that at the time of the search by the Government agents, only three copies were found (R. 252).

We submit, therefore, that whatever might be the interpretation of the material distributed prior to the enactment of the Smith Act, there is no basis whatever for the conviction of these petitioners under § 10.

B. Insubordination in the armed forces.

There is no evidence in the record showing a conspiracy to cause insubordination in the armed forces.

In its opinion the Circuit Court of Appeals states that the record contains substantial evidence of the purpose of the Socialist Workers Party to create insubordination in the armed forces by propaganda therein.

An examination of the pages in the record cited by the Circuit Court of Appeals to support its conclusion shows that such testimony as is based on documents *has nothing whatever to do with creating insubordination in the armed forces.* They deal with such questions as advocating military training under trade union control, greater democracy in the army, election of officers in the armed forces, and opposition to what the petitioners designate as an imperialist war.

In their literature, as the testimony shows, the Socialist Workers Party was absolutely opposed to sabotage or obstructing the conduct of the war by the Government (see Exhibit K, R. 1125-1128). It is only by assuming that the

ideas of the Socialist Workers Party would necessarily cause insubordination in the armed forces (an assumption which Government counsel seem to hold. See Mr. Schweinhaut's cross-examination of petitioner Cannon, R. 986-987) that it can be said that the Socialist Workers Party is guilty of conspiring to cause insubordination in the armed forces.

The testimony that deals with the causing of insubordination consists of oral statements alleged to have been made by some of the petitioners to the witnesses. They can be found at the following pages of the record:

James Bartlett (R. 277-279, 280, 457-458, 462-464).
Roy F. Wieneke (R. 494).
John J. Novack (R. 515).
Henry Harris (R. 543, 548).
Emanuel G. Holstein (R. 657).
Sidney Brennan (R. 685-686, 688).
Eugene J. Williams (R. 741-742).

Drawing all inferences from this testimony in favor of the Government, it can be summarized as follows: (1) *if* the Selective Service Act is passed, or (2) *if* members of the Socialist Workers Party are drafted, and (3) *if* this country enters into the war, the Socialist Workers Party will then spread dissension and cause dissatisfaction by complaining about the food and bedding. This conspiracy therefore could go into effect only upon the fulfillment of certain conditions which after all might never occur. Furthermore, it must be assumed that the food and bedding would be unsatisfactory. Suppose they were excellent—what then? If they were not satisfactory, would kicking about them constitute insubordination?

It is important to note that there is no evidence to show that disaffection in the armed forces was actually created, or that the persons who were allegedly advised to complain about food and bedding ever went into the armed forces.

The testimony introduced by the Government to prove the charge of conspiracy to cause insubordination, all of which is listed above, can hardly be taken seriously. Certainly, it was inadequate to justify the Court in permitting this question to go to the jury.

But even assuming that sufficient weight could be given to the testimony to justify the Court in submitting to the jury the question of causing insubordination, there is no evidence of any *conspiracy* on the part of the appellants. At best the testimony with reference to that section of the second count refers to statements attributed to only seven defendants. There is no evidence that the other defendants knew anything about these statements or consented to them. They could not be bound by such statements; nor could such statements be interpreted to mean that a conspiracy existed to cause insubordination.

C. Evidence as to particular petitioners.

There is no evidence whatever, with reference to any of the petitioners, that they interpreted the program of the Socialist Workers Party to mean advocating the overthrow of the Government by force or the causing of insubordination in the armed forces.

In its opinion the Circuit Court of Appeals treats this question as one simply of having knowledge of the nature of the program. The fact that the petitioners were leading members of the party is cited by the Court below as an argument that they must have known the nature of the party program. *But that is not the question.*

Admittedly they knew the program. *The question is whether they interpreted the program to mean advocating the violent overthrow of the Government or advocating creating insubordination in the armed forces.*

In the *Schneiderman* case (*supra*) this Court expressly held that where two interpretations of the program of a party are possible, one reprehensible and the other permissible, the Court cannot attribute the reprehensible one to a member of the party in the absence of overt acts indicating that such was his interpretation.

There is in this case a serious dispute as to the correct interpretation of those sections of the party program which deal with the transformation of the capitalist order into a socialist system. It was necessary therefore for the Government to prove not only that the defendants knew the program but that they interpreted it in the reprehensible manner.

In the case of one of the petitioners the documentary evidence in the record proves that he interpreted Marxism to mean *prediction* of violence rather than advocacy (see Exhibit 42, R. 1220-1273). This petitioner, as well as others, were convicted not because they advocated violence, not because they interpreted the program to mean that it advocated violence, but because, in the jury's opinion, they were wrong in the interpretation they gave to the program.

If this petition is granted, we shall in a brief analyze all of the evidence with reference to each defendant. For the purpose of this petition we contend for the recognition of the general principle that it is necessary for the Government, as part of its case, to prove that each defendant interpreted the program of the organization to which he belonged as meaning advocacy of violence or of creating insubordination in the armed forces.

D. Membership subsequent to enactment of statute.

As to certain petitioners there is no evidence whatever that they were members of the alleged conspiracy after the date of the enactment of the statute upon which the second count of the indictment is based.

The statute for the alleged violation of which the petitioners were convicted was enacted June 28, 1940. The Government proved that all the defendants were members of the Socialist Workers Party at some time between July 15, 1938 and June 28, 1940. Did that constitute a *prima facie* case of membership after June 28, 1940?

Government counsel expounded the theory that prior to June 28, 1940 the party constituted a conspiracy to violate

Sec. 6, Title 18, the basis of the first count of the indictment; that subsequent to June 28, 1940 this same conspiracy continued but added another crime to its calendar, namely, the one prohibited by Secs. 9, 10 and 11 of Title 18, constituting the basis of the second count (R. 846).

Since the jury acquitted the defendants on the first count, it must be presumed that there was no illegal conspiracy prior to June 28, 1940. In other words, membership in the party, assuming even that it advocated the overthrow of the Government by violence, was perfectly legal prior to June 28, 1940. It became illegal only after that date. Hence it was the duty of the Government to prove membership in the party subsequent to June 28, 1940.

It cannot be presumed that membership in a legal organization is presumptive evidence of continued membership after the organization has been made illegal. *The presumption must be quite the contrary.*

We shall not proceed to a detailed analysis of the nature of the evidence which the Government relies on to prove membership of some of the petitioners subsequent to the enactment of the statute. That will be done in a separate brief if this petition is granted.

We need only remark that the Government in its brief filed in the Circuit Court of Appeals admits that two of the petitioners were proved to be members only up to the spring of 1940, that is, prior to the enactment of the statute. The brief then goes on to state that the evidence with reference to these two petitioners is "sufficiently proximate to June 28, 1940 to justify the jury's conclusion".

It is quite clear, therefore, that the Government contends that proof of membership in the party prior to June 28, 1940 is sufficient to prove membership subsequent to that date, thus punishing an individual for an act which was not criminal at the time of its commission.

CONCLUSION

It is respectfully submitted that a writ of certiorari be granted to review the order of the Circuit Court of Appeals for the Eighth Circuit so that the judgments of conviction herein may be reversed.

OSMOND K. FRAENKEL,
ALBERT GOLDMAN,
Counsel for Petitioners.

APPENDIX

18 U. S. C. 9, 10, 11 (54 Stat. 670)

"Sec. 9—

(a) It shall be unlawful for any person, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States—

(1) to advise, counsel, urge, or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or

(2) to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States.

(b) For the purposes of this section, the term 'military or naval forces of the United States' includes the Army of the United States, as defined in section 1 of the National Defense Act of June 3, 1916, as amended (48 Stat. 153; U. S. C. Title 10, sec. 2), the Navy, Marine Corps, Coast Guard, Naval Reserve, and Marine Corps Reserve of the United States; and, when any merchant vessel is commissioned in the Navy or is in the service of the Army or the Navy, includes the master, officers, and crew of such vessel.

"Sec. 10—

(a) It shall be unlawful for any person—

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officers of any such government.

(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

(b) For the purposes of this section, the term 'government in the United States' means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

"Sec. 11—

It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title."

The "ways and means" portion of the indictment (R. 7-10)

"(1) the defendants, who were officers, leaders, active members, and in control of a certain political party or organization known as the Socialist Workers Party, which said party or organization was composed of a large number of persons, the exact number being to the Grand Jurors unknown, would procure, induce, influence, incite, and encourage the members of the Socialist Workers Party, and divers other persons, whose names are to the Grand Jurors

unknown, to join with them to bring about the overthrow by force of the Government of the United States, and the destruction thereof by force, and the opposition by force to the authority thereof.

(2) The defendants would seek to bring about, whenever the time seemed to them propitious, an armed revolution against the Government of the United States, and the authority thereof.

(3) Said armed revolution would be brought about and joined in by the workers and laborers and farmers of the United States, or as many of them as said defendants and their co-conspirators could procure and induce to engage therein.

(4) Said workers, laborers and farmers would be by the defendants and their co-conspirators urged, counseled, and persuaded that the Government of the United States was imperialistic, capitalistic and organized and constituted for the purpose of subjecting workers and laborers to various and sundry deprivations and for the purpose of denying to them an alleged right to own, control and manage all property and industry in the United States, all to the end that said workers and laborers would be willing to take part in the armed revolution envisaged and projected by said defendants.

(5) Members of Socialist Workers Party would be placed in key positions in all major industries, among others the transportation, mining, lumbering, farming, shipping, and manufacturing industries, so that said party members could and would induce, persuade, and procure the workers and laborers in said industries to join said party, embrace its principles and objectives and obey the commands of its leaders, thereby enabling the defendants and other leaders of said Socialist Workers Party to obtain and exercise absolute control of all industries in the United States to the

end that by paralyzing the same, said projected armed revolution could be more easily and successfully accomplished.

(6) Members of the Socialist Workers Party would be placed in key positions in all trade unions and said party members would especially endeavor to obtain absolute control over such trade unions, so that the members thereof, comprising a vast number of workers and laborers in the United States, would be subject to the will and commands of said party leaders, thus enabling the defendants and their co-conspirators to bring about a complete stoppage of work in the major industries of the United States at any given time, and preventing thereby the duly constituted government of the United States from adequately defending itself against the armed revolution the defendants conspired to bring about.

(7) The defendants and their co-conspirators would endeavor by any means at their disposal to procure members of the military and naval forces of the United States to become undisciplined, to complain about food, living conditions, and missions to which they would be assigned, to create dissension, dissatisfaction and insubordination among the armed forces, to impair the loyalty and morale thereof, and finally to seek to gain control of said naval and military forces so that the enlisted personnel thereof would revolt against its officers, thereby enabling said defendants to overcome and put down by force and arms the constitutional government of the United States.

(8) When the Selective Service Act was passed, the members of said Socialist Workers Party would be urged to willingly accept service, but after being inducted into the army of the United States, to do everything in their power to disrupt, hinder and impair the efficient functioning thereof, and when the appropriate time came to turn their weapons against their officers.

(9) The defendants and their co-conspirators would, and they did, advocate and attempt to bring about control of the Militia by the workers and laborers of the United States, especially by trade unions; and the defendants would advise, counsel, and encourage the said workers and laborers to arm themselves and to become proficient and trained in the use thereof so that they would be better equipped to overthrow, destroy, and put down by force the Government of the United States.

(10) Workers and laborers would be, and they were, organized into military units which would be armed and drilled and taught how skillfully to use pistols and rifles, which said units would be, and were, called 'Union Defense Guard'; said units would ostensibly be used for protection against violent attempts to destroy trade unions, but were in truth and in fact, designed and intended to be used ultimately to overthrow, destroy, and put down by force the duly constituted, Constitutional Government of the United States.

(11) The said defendants and their co-conspirators would, and they did, by and for the use of themselves and other persons to the Grand Jurors unknown, procure certain explosives, firearms, ammunition, weapons and military equipment, for the aforesaid purpose.

(12) The said defendants and their co-conspirators would, and they did, accept as the ideal formula for the carrying out of their said objectives the Russian Revolution of 1917, whereby the then existing government of Russia was overthrown by force and violence, and the principles, teachings, counsel and advice of the leaders of that revolution, chiefly V. I. Lenin and Leon Trotsky, would be, and they were, looked to, relied on, followed and held out to others as Catechisms and textbooks directing the manner and means by which the aforesaid aim of the defendants could, and would be, accomplished; and accordingly, cer-

tain of the defendants would, and they did, go from the City of Minneapolis, State and District of Minnesota, and from other cities in the United States to Mexico City, Mexico, there to advise with and to receive the advice, counsel, guidance, and directions of the said Leon Trotsky.

(13) The said defendants and their co-conspirators would, and they did, endeavor to procure and persuade as many other persons as possible to join with them in their undertaking by printing, publishing, selling, distributing and publicly displaying and by causing to be printed, published, sold, distributed, and publicly displayed, written and printed matter, including leaflets, pamphlets, newspapers, magazines and books which advocated, advised and taught the duty, necessity, desirability, and propriety of overthrowing and destroying by force and violence all governments in the world said by the defendants, their mentors and leaders, to be imperialistic and capitalistic, and of the governments so characterized, the Government of the United States of America was said to be the foremost."

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 431

VINCENT RAYMOND DUNNE, JAMES P. CANNON, EDWARD PALMQUIST, MAX GELDMAN, OSCAR COOVER, EMIL HANSEN, ALFRED RUSSELL, GRACE CARLSON, HARRY DEBOER, FARRELL DOBBS, FELIX MORROW, CARL B. KUEHN, JAKE COOPER, CARLOS HUDSON, CARL SKOGLUND, ALBERT GOLDMAN, CLARENCE HAMEL AND OSCAR SCHOENFELD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1316–1344) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered September 20, 1943 (R. 1344–1345).

The petition for a writ of certiorari was filed October 16, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

STATUTES INVOLVED

Sections 1, 2, and 3 of the Alien Registration Act of June 28, 1940, c. 439, Title I, 54 Stat. 670–671 (18 U S. C. 9, 10, and 11), provide as follows:

> SECTION 1. (a) It shall be unlawful for any person, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States—
>
> (1) to advise, counsel, urge, or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or
>
> (2) to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States.
>
> (b) For the purposes of this section, the term "military or naval forces of the United States" includes the Army of the United States, as defined in section 1 of the National Defense Act of June 3, 1916, as amended (48 Stat. 153; U. S. C., title 10,

sec. 2), the Navy, Marine Corps, Coast Guard, Naval Reserve, and Marine Corps Reserve of the United States; and, when any merchant vessel is commissioned in the Navy or is in the service of the Army or the Navy, includes the master, officers, and crew of such vessel.

SEC. 2. (a) It shall be unlawful for any person—

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

(b) For the purposes of this section, the term "government in the United States" means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

SEC. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

QUESTIONS PRESENTED

1. Whether Sections 1, 2, and 3 of the Alien Registration Act of June 28, 1940, either inherently or as applied in the instant case, are invalid under the First Amendment as an unwarranted restriction of the right of free speech.

2. Whether as to each of the petitioners the evidence was sufficient to sustain his conviction.

STATEMENT

The eighteen petitioners and eleven other persons[1] were indicted, in two counts, in the District Court of the United States for the District of Minnesota (R. 5–12). The first count charged violation of Section 6 of the Criminal Code (18

[1] Of the 11 others one died before trial (R. 59), 5 were acquitted on both counts by a verdict directed by the court (R. 72), and the remaining 5 were acquitted on both counts by the jury (R. 73–74).

U. S. C. 6)[2] (R. 10); the second charged violation of Section 3 of the Act of June 28, 1940 (*supra,* p. 4), in that the defendants conspired to commit acts prohibited by Sections 1 and 2 (*supra,* pp. 2–4) (R. 10–12). The jury acquitted all of the petitioners on the first count but found them guilty on the second (R. 73–74). Twelve of them were sentenced to 16 months' imprisonment each,[3] and six to imprisonment for a year and a day each.[4] On appeal to the Circuit Court of Appeals for the Eighth Circuit, the convictions were affirmed (R. 1316–1345).

Count 2 (R. 10–12) alleged, in substance, that continuously from June 28, 1940, petitioners conspired and agreed with each other and with unknown persons:

(1) To advise, counsel, urge and cause, and to distribute printed matter advising, counseling and

[2] This section provides as follows:

"If two or more persons * * * conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than $5,000 or imprisoned not more than six years, or both."

[3] Dunne (R. 81), Cannon (R. 82), Carlson (R. 84), Cooper (R. 85), Coover (R. 86), Dobbs (R. 89), Geldman (R. 90), Goldman (R. 92), Hansen (R. 93), Hudson (R. 95), Morrow (R. 98), and Skoglund (R. 103).

[4] DeBoer (R. 88), Hamel (R. 94), Kuehn (R. 97), Palmquist (R. 99), Russell (R. 100), and Schoenfeld (R. 102).

urging, insubordination, disloyalty, mutiny, and refusal of duty by members of the armed forces of the United States (R. 11);

(2) To advocate, abet, advise, and teach, and to publish and issue printed matter advocating, advising, and teaching, the duty, necessity, and propriety of overthrowing and destroying the Government of the United States by force and violence (R. 11–12);

(3) To organize and help to organize, and knowing their purposes, to become members of and affiliated with, societies, groups, and assemblies of persons, teaching, advocating, and encouraging the forcible overthrow and destruction of the Government of the United States (R. 12).

Count 2 also alleged, in substance, that petitioners sought to carry out and accomplish their conspiracy (R. 12) by certain acts taken and to be taken (R. 7–10), including the following:

(1) As officers, leaders, and active members of the Socialist Workers Party, they would induce and encourage other members, and nonmembers, to join with them to bring about forcible opposition to, and violent overthrow and destruction of the Government of the United States (R. 7);

(2) The overthrow would be brought about at a time deemed propitious by petitioners by means of an armed revolution, to be joined in by such workers and laborers as petitioners could procure by urging, counseling, and persuading them that the

United States Government was imperialistic and capitalistic and organized and constituted to subject them to deprivations, and to foreclose them from owning, controlling, and managing all property and industry in the country (R. 7);

(3) Party members were to be placed in key positions in major industries, and in trade unions, where they would be in position to cause a cessation of work and of production, and thereby facilitate the armed revolution by preventing necessary measures of defense by the Government (R. 8); members of the United States military and naval personnel were to be made dissatisfied, undisciplined, and insubordinate, the efficiency of those forces hindered by party members when drafted, and control of them sought, so as to cause the personnel to revolt against their officers (R. 8–9); control by workers and trade unions of the militia was to be advocated; workers were to be advised and encouraged to arm and become proficient in their use, and to be organized into military units, and drilled in the use of arms, ostensibly as, and designated, Union Defense Guards, but designed and intended to be ultimately used to overthrow by force the Government of the United States (R. 9);

(4) Firearms, weapons, and ammunition were to be procured for those purposes (R. 9); the violent Russian Revolution of 1917 was to be accepted as the formula, and the principles, teach-

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ings and advice of V. I. Lenin and Leon Trotsky were to be relied on as guides to action, for the accomplishment of petitioners' purposes (R. 9–10); and the personal advice and counsel and directions of Leon Trotsky were to be sought and received by petitioners, certain of whom were to visit him in Mexico for those purposes (R. 10);

(5) Followers were to be sought by printing and distributing printed matter advocating the forcible overthrow and destruction of all capitalist governments, of which the United States was considered to be the foremost (R. 10).

The evidence in support of these allegations may be summarized as follows:

1. *History of the Socialist Workers' Party.*—Petitioners Dunne and Cannon were among those who were expelled from the Communist Party in 1928 for supporting Trotsky in his controversy with Stalin,[5] and who thenceforth designated themselves the "Trotskyist Group" (R. 858–859, 1023). Organizing as a group they took the name "Communist League of America" and within six months had 100 members and held a conference. In 1934 they united with the American Workers' Party, adopting the name "Workers' Party of the United States." (R. 859.) In 1936 the Trotskyists joined the Socialist Party (R. 195–196, 860), fol-

[5] Previously petitioners Dunne and Cannon had been members of the International Workers of the World (R. 857–859, 1050–1051).

lowing a split in that Party which had resulted in the withdrawal of its more conservative elements (859–860); but while in the Socialist Party they maintained their identity as a Section (R. 195, 402).[6] They were expelled by the Socialist Party in 1937 (R. 860). The group then arranged a convention at Chicago, held December 31, 1937–January 3, 1938, at which the Socialist Workers' Party was organized (R. 861, 1176), with Trotsky as its ideological leader (R. 260, 285).[7] A Constitution and Declaration of Principles

[6] Included in the Trotskyist Group while affiliated with the Socialist Party were petitioners Dunne (R. 195, 458–459), Cannon (R. 860), Carlson (R. 1110), Dobbs, DeBoer, Skoglund, Hudson, Cooper, Hansen, Palmquist, and Kuehn (R. 195–196).

[7] The Socialist Workers' Party was organized on a national basis, with headquarters in New York (R. 202) and branches throughout the country, the largest being in Minneapolis, Chicago, and New York (Pet. 4). It has a national membership of about 2,000, the Minneapolis branch having about 200 (R. 446). The highest body is the National Convention. Between conventions its authority is vested in a National Committee, which directs the work of and decides questions of policy for the Party (R. 212). The basic Party units are the branches, organized either on a territorial or occupational basis (R. 211), and governed by an executive committee between meetings (R. 212, 213). Each member accepts the Party's Declaration of Principles and Constitution, to which he is bound, must belong to a branch, and agrees to engage actively in Party work and to abide by Party discipline (R. 210, 211, 212). Decisions of the National Committee and governing bodies are obligatory on members and subordinate bodies, and violations are punishable by expulsion (R. 214–215).

(Gov. Ex. 1, R. 1176–1219) were adopted.[8] The Party affiliated with and became the American Section of the Fourth International (R. 1194), an international revolutionary organization under the leadership of Trotsky (R. 260, 1193).

2. *Program and Activities of the Socialist Workers Party.*—The program of the Party rests on the principles of Marxism as expounded by Marx, Engels, Lenin, and Trotsky, and on the basic documents of the Third Communist International from its founding through its first four World Congresses (R. 220). At this point the Party breaks with the Communist International for the alleged reason that the latter, under the leadership of Stalin, has become "reactionary" and "bureaucratic" and has lost its "revolutionary" character (R. 220, 225, 226, 290–291).

The objective of the Party is the destruction of the existing constitutional government in the United States (R. 744–746, 979, 1084, 1183), and the substitution of a Party dictatorship resting on the armed force of mass militia and having its basis in workers' councils or soviets (R. 221, 258, 263, 1180, 1183–1185). The Party regards itself as the "general staff" to direct the working

[8] As petitioners state (Pet. 4), at a special convention in December 1940, the Declaration of Principles was suspended, and its circulation was thereafter discontinued (R. 870, 903); but they conceded at the trial (R. 872–874) that a new declaration was prepared at a conference held shortly before the trial and that "the basic principles of the new are the same as the old."

classes in the revolutionary accomplishment of its program (R. 219, 220, 267). Furthermore, its program calls for the domination of labor unions by placing Party members in key positions therein, so as to enable it to control the economy of the nation (R. 271, 439, 683), to stop production (R. 737), and, by precipitating or utilizing a crisis arising from whatever causes, to bring about an uprising and the overthrow of the Government (R. 264, 272, 273, 287, 413, 439, 465, 466, 472, 492, 540, 544, 547–548, 582–583, 591, 595, 598, 614, 688, 743, 744–746, 748, 760, 803, 805–807). The Party's policies "flow from the perspective of seizing power" (R. 582), and its program contemplates the development of "revolutionary situations" during periods of war or depression or of public scandal (R. 234, 439, 444, 464–465, 740) so that at some propitious time of such a character the overthrow of the Government may be attained. The Party teaches that the contemplated revolution is imminent (R. 542–544, 628, 738) and that it may be successfully achieved in this country within the comparatively near future (R. 582–583). It urges that each worker should become proficient in the military arts so that "he can best defend the interests of the working class" (R. 620), and advocates the taking advantage of a war emergency, whenever it may occur, for the purpose of attaining the overthrow of the Government by turning "the imperialist war into civil war" (R. 719, 731).

The Party advocates continuance of the class struggle during war (R. 376) and would require, as a condition of its being willing to support the defense of this country in time of war, "that we first overthrow the government of the capitalists and replace it with a government of the workers" (R. 375).[9] With the contemplated revolution thus achieved the Party program calls for an ensuing dictatorship of the proletariat, which would continue during a period of transition in which all property would be expropriated without compensation and the so-called capitalistic class eliminated. (R. 576–577, 1182–1183.) The Party program is international in scope, calling for integration and submergence of the United States in a world socialist soviet state (R. 219, 221, 222, 264, 1186).

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[9] The true allegiance of the Party and its members is to the Union of Soviet Socialist Republics (R. 235, 236, 547, 1207). They differentiate between the U. S. S. R. and the "Stalinist bureaucratic machine" which controls it (R. 236, 1191, 1208–1209). They defend the former (R. 236, 1208–1209) while advocating the forcible overthrow of its ruling group (R. 935). In the event of the United States becoming allied with the U. S. S. R. in war, they intended to support the latter, while "expos[ing] the treacherous imperialist aims of the United States in the alliance" and calling for its overthrow (R. 235). A meeting of members of the Party at Minneapolis in 1940 adopted a resolution "that they would defend the principles of Soviet Russia against the United States and any other capitalistic government in the event of war," and the discussion preceding adoption of such resolution proposed that this would be done "by tying up transportation and working to sabotage industry" (R. 547).

As a condition of membership in the Party, it is necessary to accept its Declaration of Principles and agree to submit to its discipline and to engage actively in its work (R. 1213). The Party Constitution provides that all decisions of its governing bodies are binding on the members, and subjects them to disciplinary action for disobedience (R. 1217).

As previously noted, the Party program calls for domination of trade-unions. It has been able to secure the control of Local No. 544, International Brotherhood of Teamsters (R. 269–270, 330, 456, 457, 491–492, 511, 513, 689, 697), the largest A. F. of L. Union in Minneapolis (R. 682), having about 5,000 members (R. 496).[10] Through this union it was in a position to control the Central

[10] This union and its predecessor, Local No. 574, which had a membership of 6500 in 1941 (R. 658), were controlled by petitioners from 1936 through June 1941 (R. 689) as follows: The leadership of the Local was in the hands of Dunne, Skoglund, Dobbs, and Hansen (R. 456, 457, 658). Dunne was an organizer in 1938 (R. 267, 269), 1939 (R. 604–605) and 1940 (R. 697), and on the Executive Board in 1939 (R. 512). Skoglund was president of the Executive Board in 1938, 1939 (R. 604) and 1940 (R. 513), a trustee in 1938 (R. 267, 269), and an organizer in 1939 (R. 512) and 1940 (R. 697). Hansen was an organizer and trustee in 1938 (R. 267–268, 269, 604) and 1939 (R. 512, 604), and a trustee in 1940 (R. 697). He also presided at meetings of the Grievance Board (R. 507). Hamel was an organizer in 1938 (R. 267, 269), 1939 (R. 512, 604–605) and 1940 (R. 697). DeBoer was business agent in 1938 (R. 267, 270), and an organizer in 1938 (R. 270, 604), 1939 (R. 512, 604) and 1940 (R. 697). Russell was an executive officer in 1940 (R. 331, 332, 475).

Labor Union and was represented on the Teamsters Joint Council (R. 682). It also controlled the Federal Workers Section of the local (R. 270, 495, 549).[11] Petitioner Dobbs held responsible positions in the International Brotherhood of Teamsters (R. 269, 331, 335); petitioner Coover was a member of the Electrical Workers' Union (R. 269); another member of the Party was in charge of the Cab Drivers' Union, Local No. 221 (R. 681); and petitioners Hudson and Morrow were editors of the *Northwest Organizer,* the official publication of the Teamsters' Joint Council (R. 270, 605). The Party assessed and collected ten percent of the salaries of all of its employed members (R. 408–409, 697).

The Party acted in close collaboration with Trotsky[12] (R. 260, 284, 356, 416, 605, 630), and adopted his suggestion that military units be established in labor unions (R. 286–289, 491, 546, 640–641).[13] Attempts were made to establish such a unit in Local No. 359, Warehouse Union, and a Union Defense Guard was set up in Local No.

[11] Petitioners Geldman and Palmquist controlled this section, and petitioner Kuehn was active in it (R. 270, 495). Petitioners Cooper and Schoenfeld were active in the Youth Section (R. 310, 495, 496).

[12] Leading Party members used an automobile owned by Local No. 544 for a trip to Mexico to visit Trotsky (R. 605, 610–613), and union funds were paid to a Party member for serving as a guard for Trotsky (R. 289, 544, 605–607, 630).

[13] Trotsky specifically made this suggestion to petitioner Hansen, and also discussed it with petitioners Dunne and Cannon (R. 287–289).

544 (R. 289). Such guards were to constitute the nucleus of a revolutionary Red Army (R. 266, 606), to be used locally to battle the police and National Guard (R. 638, 639, 725) and on a national scale to overthrow the Government by armed rebellion at an opportune time (R. 415). The activities of the Union Defense Guard of Local No. 544 were directed by Party members (R. 491–492, 535, 585, 591),[14] and its meetings were addressed by them (R. 1005, 1007, 1011, 1012, 1014).[15]

Rifles and ammunition were supplied for the Guard (R. 454, 1015), target practice was held regularly every week (R. 454, 532, 696, 758, 1015), and at one time a mass test mobilization of at least 400 Guardsmen was staged in the streets of Minneapolis (R. 535, 629, 693, 758).[16] The Party is not pacifistic (R. 713, 795, 805, 1084) and accepts the principle of military training, but does so in order that the proletariat may know how to use guns effectively (R. 617–618, 804–805, 822) and to act as commanders (R. 794) when revolution is

[14] Petitioner Skoglund was president of the Executive Board of Local No. 544 when the Guard was formed (R. 1015). Petitioner Hansen was in charge of the Guard (R. 585, 591).

[15] Petitioners Dunne (R. 763–764, 1005, 1007, 1014), Dobbs (R. 1005), DeBoer (R. 1011, 1012), Hansen (R. 1011, 1012, 1014), and Skoglund (R. 1012, 1014).

[16] Petitioner Hansen with another was in charge of the mobilization (R. 535, 758), and petitioner DeBoer participated therein (R. 537).

"ripe" (R. 265, 543, 795, 796, 815). Its program calls for agitation to impair the discipline of the present armed forces for the purpose of causing rebellion therein (R. 265, 266, 280, 564–565). Former and prospective members of the armed forces were approached and solicited to agitate for the Party and create dissension in the Army (R. 494, 538, 543, 685, 688, 741; see also R. 277–278, 280, 458, 515).

The Party contemplated and took steps toward operating illegally (R. 448, 467–468), and, at a time when it was being investigated by the Federal Bureau of Investigation, destroyed its books (R. 539, 563) and issued orders for the destruction of membership cards, assigning to each member a "number" in lieu of a card (R. 490, 500, 510). It advocates the violation of injunctions (R. 426, 428), and calls for throwing off the "shackles of bourgeois law" (R. 724–725). Petitioners do not deny the Party's advocacy of the necessity of overthrowing existing government by the use of force and violence, but undertake instead to justify resort to such means as a form of defense against force and violence that they purport to predict will come first from the supporters of the government whose overthrow they seek (Pet. 19; R. 230, 234, 235, 263, 265, 266, 377, 402, 403, 409, 411, 412, 413, 414, 472, 510, 1206–1208, 1256–1258).

Further evidence of the petitioners' knowledge of and agreement with the Party program, and of its and their activities, is set forth in the Argument (*infra*, pp. 25–42).

ARGUMENT

I

Petitioners were convicted under Section 3 of the Act of June 28, 1940, of conspiracy to violate Sections 1 and 2 of the Act. The latter sections are attacked as in violation of the First Amendment. Such a challenge is manifestly an important one. But in the context of the present case the constitutional issues will be found, we believe, to be less novel and extensive than petitioners maintain.

1. Section 1, as petitioners state (Pet. 11), which prohibits counseling of disaffection in the armed forces, is substantially identical with the portion of Section 3 of the Espionage Act of June 15, 1917 (c. 30, 40 Stat. 219; 50 U. S. C. 33), which punishes "whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty" in the armed forces. The constitutionality of the earlier statute was upheld by a unanimous Court in *Schenck* v. *United States*, 249 U. S. 47.[17] Petitioners distinguish the present

[17] Also in *Frohwerk* v. *United States*, 249 U. S. 204, and *Debs* v. *United States*, 249 U. S. 211.

statute only on the ground that it was enacted when the country was at peace and applies in both peace and war (Pet. 12). But the power of Congress to "raise and support armies" and to "provide and maintain a navy" exists during peace as well as war; and a law whose plain object is to maintain loyalty, obedience, and integrity in the armed forces by protecting them from planned subversion, whether the nation be at peace or war, is, we submit, "necessary and proper for carrying into execution the foregoing powers." The question is not whether imminence of war justifies the stifling of opposition to war but whether it may call as imperatively as war itself for measures making it unlawful, as the present statute does, deliberately to foment "insubordination, disloyalty, mutiny, or refusal of duty, in the armed forces."

Petitioners contend, however, that there was no "clear and present danger" of military disaffection as a result of their activities, and that hence Section 1 is invalid as here applied (Pet. 13, 15–16). This contention ignores the fact that a necessary element of the offense under Section 1 is a specific intent to interfere with the loyalty, morale, or discipline of the armed forces.[18] Moreover, the jury was instructed that the law punishes those "who knowingly indulge in acts or expressions barred by the statute having for their

[18] In quoting from this section, petitioners omit the portion containing the requirement of such intent (Pet. 16).

end the undermining of that loyalty"; and that to be convicted the defendants must be found beyond a reasonable doubt to have conspired "with intent to" interfere with military loyalty or discipline (R. 1165–1166). This is vitally different from a predication of guilt on utterances having a "normal tendency" to cause the apprehended harm, and constitutes a safeguard which is recognized as being fully as adequate as the test of "clear and present danger" of the harm. See Holmes, J., dissenting, in *Abrams* v. *United States,* 250 U. S. 616, 628: "Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable."[19] The Court has recently put the matter pithily (*Taylor* v. *Mississippi,* decided June 14, 1942, Nos. 826–828, 1942 Term): "As applied to the appellants it punishes them although what they communicated is not claimed or shown to have been done *with an evil or sinister purpose,* to have advocated or incited subversive action against the nation or state, *or* to have threatened any clear and present danger to our institutions or our government." [Emphasis supplied.] The evidence showing that peti-

[19] See also Brandeis, J., concurring in *Whitney* v. *California,* 274 U. S. 357, 373.

tioners acted with requisite intent in summarized *infra*, pp. ~~25–33~~, 37–41.

Section 1 is additionally supported by the considerations discussed immediately below in support of Section 2.

2. Section 2 of the Act, prohibiting advocacy of overthrow of any Government in the United States by force, is substantially similar to the peacetime statutes sustained in *Gitlow* v. *New York*, 268 U. S. 652, and *Whitney* v. *California*, 274 U. S. 357.[20] Petitioners distinguish these cases only on the ground that they involved the Fourteenth rather than the First Amendment (Pet. 12–13). But in view of the spate of decisions holding state action violative of the guarantee of freedom of speech, press, and assembly, the distinction is without substance. It is unnecessary to consider whether the *Gitlow* and *Whitney* cases were correctly decided on their facts. They do, at all events, lay down a principle that has been consistently recognized as important, and that has special bearing on the precise application of the "clear and present danger" test in the present case. The principle, established in the *Gitlow* case, is that weight must be given to the fact that "the legislative body itself has previously determined the danger of

[20] The present statute makes a more specific requirement of intent to cause such overthrow, in respect of the distribution of written matter.

substantive evil arising from utterances of a specified character" (268 U. S. at 671). In contrast are the cases involving statutory or common-law prohibitions "which merely punish specified acts in general terms, without specific reference to the use of language" (*Id.* at 670). This distinction has been recognized in subsequent and recent decisions, as the court below observed (R. 1330). The judgment here involved is one which, as described in *Bridges* v. *California,* 314 U. S. 252, 261, comes "encased in the armor wrought by prior legislative deliberation." See also *Cantwell* v. *Connecticut,* 310 U. S. 296, 307–308; *Herndon* v. *Lowry,* 301 U. S. 242, 261–264. We do not suggest that the legislative judgment is conclusive. We do maintain that it affects significantly the application of the "clear and present danger" rule.

As applied to Section 2 of the present Act, the constitutional question is one of sustaining the legislative judgment concerning the danger produced by a class of utterances, not one of establishing that the utterances of the defendants in themselves constituted such a danger. Petitioners have proceeded on a contrary assumption. Their requests for instructions on this issue embodied the requirement that the jury find beyond a reasonable doubt that defendants' utterances themselves created a clear and present danger of the overthrow of the Government of the United States

by force and violence (R. 1133, 1134). Such instructions were properly refused (R. 1143). The issue of clear and present danger was not thereby put out of the case, however. It was considered by both courts below in passing upon the legislative judgment (R. 854, on motion of defendants for directed verdict; R. 1320–1321, 1329–1330).[21] The legislative judgment is supported not only by facts judicially cognizable bearing on the crisis which we were entering at the time the Act was passed, but also by the evidence concerning petitioners' program and militant activities themselves, both before and immediately after the date of enactment of the Act. The evidence summarized in the Statement, *supra,* and at pages 25–41, *infra,* is thus relevant on both the question of petitioners' guilt in fact and the question of the reasonableness of the legislative judgment.

[21] The asserted concession of Government counsel at the trial, referred to in the Petition (pp. 13, 15), is simply that it was not necessary to show a clear and present danger "that these defendants could have succeeded in overthrowing the Government by force." Defendants' counsel had argued that an armed guard of "perhaps five hundred men at the most" did not constitute a danger "to the existence of the United States" (R. 834). The assumption that Congress could penalize only that conduct which a jury would conclude was, of itself and in isolation, beyond doubt an immiment danger to the national Government, is a basic misconception in petitioners' argument.

II

Petitioners, conceding that they knew the Party program (Pet. 23), contend that it was subject to two interpretations, one reprehensible and one permissible, and that there is no evidence showing that they interpreted it to advocate overthrowing the Government by force or causing insubordination in the armed forces (Pet. 23–24). They contend that they do not advocate the use of force and violence to bring about revolution, but merely predict that revolution will be brought about by such means. Their explanation is that they will resort to force and violence only as a defense against the resistance of the capitalist class to the establishment of socialism. (Pet. 19–21.) But the evidence must be viewed here in the light of the charge to the jury.

The trial judge specifically instructed the jury as to the very distinction between advocacy and prediction on which petitioners now rely.[22]

Other portions of the charge are also pertinent. The jury was cautioned that advocacy of a "social

[22] "You are further instructed that it is not the abstract doctrine of overthrowing organized government by unlawful means which is denounced by the law, but the advocacy of action for the accomplishment of that purpose; and a mere grouping of historical events and a prophetic deduction from them would constitute neither advocacy nor advising or teaching of a doctrine for the overthrow of government by force and violence. So that, if the defendants, on the basis of an analysis of social events, merely predicted that a change in the economic basis of society would be accompanied by

revolution" was illegal only if proved beyond a reasonable doubt that the conspiracy was to advocate that this should be brought about by force or violence (R. 1161). The defendants had a right, the judge charged, to be active in trade unions, to strike, and to organize a guard for the defense of their union (R. 1163–1164). Likewise there was a right to criticize freely the Government and its high officials, to express opposition to our entry into war, and to condemn our economic system (R. 1165). The jury was admonished against prejudice or emotionalism (R. 1163).

a. *Evidence of the relation of petitioners to the Socialist Workers' Party and of their activities in support of its program.*—We have previously noted in the Statement (*supra,* p. 13) that membership in the Party requires acceptance of its Declaration of Principles, agreement to engage actively in its work, and submission to the authority and disciplinary action of its governing bodies. Petitioners were organizers, charter members, and leaders of the Party, and were active in formulating and executing its program. The Party was their creation, the organ and instrumentality through which they, as the pre-existing and continuing Trotskyist Group, expressed themselves

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violence but did not conspire to advocate, advise, abet or teach the duty, necessity, propriety or desirability of the use of violence in order to effect that change, then the defendants are not guilty under that section of the second count of the indictment". (R. 1164.)

and carried on their activities. The activities of the individual petitioners in support of the Party's program may be summarized as follows:

Petitioners Dunne, Cannon, Dobbs, and Carlson.—Dunne was a delegate to (R. 655), and Cannon a member of the Leading Committee that called (R. 861), the Founding Convention of the Party. Dunne is a member of its National Committee (R. 310, 1061, 1074). Cannon is the Secretary and head of the Party (R. 857, 878) and performs duties of the National Committee (R. 913–914). Dobbs is the Party's National Labor Secretary (R. 293, 1115 1118). In 1940 Carlson was its candidate in Minnesota for United States Senator (R. 488, 1110).[23]

Dunne taught that the Party would bring about an armed uprising on a national scale at an opportune time (R. 273), rejected class collaboration

[23] Dunne attended the Party's 1939 convention (R. 546), and is the leading member of the Minneapolis branch (R. 205) and served on its Executive Committee or as presiding officer at its meetings for approximately two years (R. 197). Dunne and Carlson are state organizers for the Party in Minnesota (R. 196, 1109–1110). Dunne (R. 541), Dobbs (R. 199, 206, 256, 542–543, 736) and Carlson (R. 540, 604) frequently attended membership meetings. All four were active speakers (R. 199, 205, 256, 259, 488, 588, 617, 618, 634, 656, 736, 793, 794) and writers for the Party (R. 274, 374, 616, 617, 618, 635-636, 767, 770, 780, 822, 913, 1050). Dunne, Cannon, and Dobbs admittedly are responsible Party leaders (R. 444). Dunne and Dobbs (R. 259–260) urged the purchase, and Carlson sold (R. 246), Party literature. Dunne is considered the leading revolutionist in the United States and Dobbs his protegé (R. 300).

(R. 276, 277), and admitted that the Union Defense Guard was the nucleus of a revolutionary militia (R. 491, 763–764). Cannon wrote that Trotsky's ideas were the Party's program, and that he had given it a guide for making revolutions (R. 346); that a condition to Party defense of the country was first the overthrow of the Government (R. 375); that the "only man who counts in this time of history is the man who has a gun in his hand" (R. 616–617), since "military force decides" (R. 618); and he admitted that the Party did not limit itself merely to "predicting" violence, but advised the workers to prepare for violence (R. 885).[24] Dobbs taught the thesis of armed uprising at an opportune time (R. 273) and said the time was close at hand (R. 542–543). He wrote that workers needed a class struggle leadership because there would be "war to the knife" (R. 275). Carlson insisted that workers take advantage of military training so as to learn to use the weapons they would have when the time came to seize power (R. 488); demanded

[24] Cannon also wrote that the Party would advance to meet the enemy, not await attack (R. 375); that Marxism was a guide to action, not bookman's dogma (R. 768, 938, 988–989); and that the Fourth International would turn the next war into a revolution, such as occurred two and a half years after the last war began (R. 636). He claimed the Party was the authentic successor of the "once revolutionary" Communist Party (R. 771), and expressed views consonant with and in furtherance of the Party program of causing disintegration in the army (R. 619, 917–918, 985; see also R. 620, 656, 767, 770, 963, 968, 969).

facilities be given workers to learn the use of modern weapons (R. 794); and commended a program of armed seizure of power (R. 796).[25]

Petitioners Skoglund, Hudson, Cooper, Geldman, and Morrow.—Skoglund and Geldman were delegates to the Founding Convention of the Party (R. 655), and the latter was a delegate to its 1939 convention (R. 546). The former is a member of the National Committee (R. 309, 654–655). Skoglund, Hudson, Cooper, and Geldman belong to the Minneapolis branch; all four acted as chairmen of its meetings and served on its Executive Committee (R. 197–198, 204, 207–208, 256, 296, 493, 510, 528, 540, 545). Morrow came from New York to the Minneapolis branch, where he was active (R. 206).[26]

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[25] For further statements of the same nature by Dunne, see R. 257–258, 282–284, 403–404, 466, 530, 541, 598, 606, 653, 656, 780; by Dobbs, R. 563–564, 656; and by Carlson, R. 617–618, 793, 795, 822.

[26] All five in this group frequently attended Party meetings (R. 256, 257, 259, 267–268, 271, 273, 449, 466, 540, 545, 585). Skoglund, Hudson, Morrow, and Geldman were active as speakers at meetings (R. 205–206, 584, 604, 699, 736, 744, 746); Skoglund and Geldman made reports and the latter led discussions (R. 208, 256, 257, 450–451). Skoglund, Hudson, Geldman, and Cooper participated in the discussions (R. 256, 257, 466, 542). Skoglund, Geldman, and Cooper solicited members for the Party (R. 490, 514, 539, 613, 629, 739–740, 759–760). Hudson and Morrow wrote for the Party (R. 295, 421, 579). Cooper was a guard for Trotsky in Mexico (R. 304, 547). Cooper sold and Geldman recommended and distributed Party literature (R. 349, 531, 541, 562).

Skoglund, Hudson, and Geldman discussed the futility of balloting and the necessity of an armed overthrow of the Government (R. 257–258), and urged that the Party be made ready to take advantage of a revolutionary situation (R. 466). Cooper stated that "we" must forcibly overthrow the Government (R. 509); Morrow said that the workers would take up arms and destroy the Government (R. 744).[27]

Petitioners Hansen, Palmquist, Goldman, Schoenfeld and Russell.—Hansen, Schoenfeld, and Palmquist belong to the Minneapolis branch, the first two having served on its Executive Committee or as presiding officers at meetings for ap-

[27] For further statements of the same nature by Skoglund, see R. 273, 276, 542, 740, 760; by Hudson, see R. 276, 530, 542; also R. 688; by Cooper, see R. 492, 542, 548, 614, 759–760; by Geldman, see R. 509, 542; also R. 494, 515; by Morrow, see R. 746. Morrow and Hudson were editors of the *Northwest Organizer*, the publication of the Teamsters' Joint Council (R. 270, 695), and the former was on the editorial board of the *Fourth International* and the *Socialist Appeal* during 1940 and 1941 (R. 204–205, 649–650). Morrow wrote for the Party *Labor's Answer to Conscription* (R. 342), asserting that no war engaged in by the United States deserved support of the working class, and denouncing the existing army leadership (R. 342–344, 711–713). Hudson used the name of Carl O'Shea in writing for the Party (R. 295). Under that name he wrote a review recommending a book, *New Ways of War*, to every worker and Union Defense Guardsman, not for its political knowledge but because "the meat of the book" tells how "to make home-made grenades," to "stop tanks and armored cars," to "drill men intelligently," to "make effective ordnance of a regular shot gun and shot gun shells," to "make a field unusable as an airdrome," to "make a road block," and "to check motorcycle troops" (R. 579–581).

proximately two years (R. 197–198, 204, 539, 545). Goldman is on the National Committee (R. 312) and a responsible Party member (R. 444). He was an attorney for Trotsky (R. 487), and was in Mexico City the day after Trotsky's assassination there (R. 1119). Hansen was a guard for Trotsky (R. 605, 630), and took a leading part in the formation and direction of the Union Defense Guard (R. 287, 288, 510, 535, 537, 585, 591, 606, 742–743). Russell, as an executive officer of Local No. 544 (R. 331), acted at the directions of Party leaders (R. 332, 475).[28]

Hansen opposed class collaboration for the reason that it was preventive of successful armed revolution (R. 276), and stated that the Party's trade-union program would develop a general strike at an opportune time, for the purpose of overthrowing the Government (R. 272–273). Schoenfeld was present when violent foreign revolutions were discussed from the standpoint of

[28] Hansen, Palmquist, and Schoenfeld frequently attended Party meetings (R. 209, 267–268, 271, 494, 540, 604, 671), and participated in the discussions (R. 256–257). Goldman spoke at Party meetings, prepared lectures, and wrote for the Party (R. 199, 344, 800, 952). Schoenfeld was a member of the Executive Committee of the Young People's Socialist League (R. 209), the Party's youth organization (R. 1216). Russell distributed and explained (R. 333, 334), and Hansen distributed (R. 784–785) and sought subscribers for (R. 700), Party literature. Solicitations of members for the Party were made by Russell (R. 330, 477), Schoenfeld (R. 613), and Hansen (R. 697). The latter was a collector from employed members of the Party's 10 percent salary assessment (R. 269, 697).

avoiding their mistakes in the coming revolution in this country (R. 542). Palmquist said that if the Selective Service Act were adopted, drafted Party members would serve the Party by spreading dissension in the army (R. 515). Russell said that democratic means were futile (R. 476) and that power should be secured by the use of guns (R. 477) and force and violence (R. 476, 485). Goldman was on the editorial board of the *Fourth International* and the *Socialist Appeal* in 1940 and 1941 (R. 649–650). His writings for the Party include *What is Socialism* (R. 344–346, 952–953, 1220–1274), and *Where We Stand* (R. 800–803). In the former he asks the question whether "the state * * * the police, the army, the courts, the jails, the government" can "ever be defeated?" (R. 1247), and states that a "peaceful change" is impossible, that "revolutions cannot be prevented by any law," and that "the greater the strength of working-class organizations, the less violence will there be" (R. 1257–1258).[29]

[29] For further statements by Hansen, see R. 412–413, 542, 743, 760, 785; by Russell, R. 334, 483, 484, 478. Goldman also wrote: "A peaceful change is an ideal most desirable. * * * The question, however, is not whether it is desirable but whether it is possible. On the statute books * * * are * * * laws providing long prison sentences for anyone who advocates the overthrow of the government by violence. Such laws will be as effective as laws against the occurrence of earthquakes. * * *" (R. 1257).

Petitioners DeBoer, Coover, Kuehn, and Hamel.—DeBoer visited Trotsky in Mexico (R. 285), and took part in activities of the Union Defense Guard (R. 537). All four belonged to the Minneapolis branch and acted as chairmen of its meetings (R. 197–198, 299, 305, 545), and DeBoer, Coover, and Kuehn served on its Executive Committee (R. 197, 198, 209).[30]

Coover taught the thesis of an armed uprising in a revolutionary situation (R. 273), and stated that the Government must be overcome by force and violence (R. 509–510). DeBoer stated that this country needs a revolution (R. 527), and engaged in an argument with the Government witness Bartlett when the latter expressed lack of sympathy with the Party program of force and violence (R. 412). Kuehn participated in a discussion contrasting the Party's program of armed overthrow of the Government with that of the So-

[30] All in this group frequently attended Party meetings (R. 207, 209, 256–257, 493–494, 540, 542, 604, 682, 694–695, 699), and participated in the discussions (R. 209, 256, 257, 736). DeBoer, Coover, and Kuehn solicited members for the Party (R. 514, 539, 597, 613, 627, 758). Coover was financial secretary of the Minneapolis branch; he collected dues (R. 196, 201, 561, 736, 749), admitted members to meetings (R. 499), and received applications to join the Party (R. 531). Hamel collected the 10 percent Party levy on the salaries of its union members (R. 269, 697). He and DeBoer recommended that a Union Defense Guard be set up in Warehouse Union Local No. 359 (R. 289). Coover recommended (R. 348–349) and distributed (R. 541, 591), and Hamel sought subscribers for (R. 700), Party literature and papers.

cialist Party that change should be effected through the ballot (R. 257–258). Hamel was present when violent foreign revolutions were discussed from the standpoint of avoiding their mistakes in the coming revolution here (R. 542).[31]

Petitioners do not deny that they were members of the Socialist Workers' Party prior to June 28, 1940, the effective date of the Alien Registration Act, nor do they deny that the Socialist Workers' Party, without change in its established principles, continued in existence with full vigor after June 28, 1940; but they contend that the evidence does not show, as to certain undesignated petitioners, that they were members of the Party after that date (Pet. 24–25).

We submit that the only petitioners as to whom the contention may be seriously advanced are Schoenfeld and Russell.[32] The record affirmatively shows that Schoenfeld was active in the

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[31] For further statements by Coover see R. 257–258, 276, 494, 511, 516, 542, 590–591, 656; by DeBoer, R. 299; by Kuehn, R. 276, 305, 494, 542; by Hamel, R. 412.

[32] The evidence of membership in the conspiracy after the enactment of the statute of the other petitioners is clear. See: Dunne (R. 1023), Cannon (R. 622, 806, 861, 914, 947), Carlson (R. 588, 699, 806, 1109–1110), and Dobbs (R. 195–196, 293, 444, 622, 806), 1938 to October 1941; Skoglund (R. 195–196; see also R. 204, 257, 267, 268, 540, 754–756), and Cooper (R. 195–196, 492; see also R. 527, 545, 548, 561–562, 627–628), 1938 to January or February 1941; Hansen (R. 195–196, 700, 784; see also R. 409, 682, 694, 695, 754, 756), and Morrow (R. 204–205, 649–650; see also R. 421), from 1938 to June and July 1941, respectively; Goldman, com-

Party in 1938 (R. 204), in 1939 (R. 495, 539), and in the early part of 1940 (R. 198, 204). Russell, likewise, was an active member of the Party in 1938 (R. 475; see also R. 479) and in 1939 (R. 479–480; see also R. 483, 484, 485). His active Party affiliation still continued in the spring of 1940, when he solicited a member for the Party (R. 330), and into the month of June, when the accusation was made, which he did not deny, that his activities as an official of Local No. 544 were dictated by Party leaders (R. 475). There is no evidence in the record that either of these petitioners withdrew from the Party or in any manner indicated a lack of interest in its doctrines or of common purpose with the other petitioners. Under these circumstances, we submit that the jury, properly instructed as it was,[33] could reasonably infer that Schoenfeld and Russell were members of the conspiracy after June 28, 1940.

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mencement of 1940 to July 15, 1941 (R. 649–650); DeBoer (R. 195, 648; see also 284–285, 527, 694–695), and Coover (R. 195–196, 699; see also R. 490, 500, 510, 562, 694–695, 736, 749, 754–756), 1938 to December 1940; Hamel, 1939 (R. 540) until the latter part of 1940 (R. 409); Geldman 1938 (R. 196, 655) to the fall of 1940 (R. 561, 1097; see also R. 510, 540, 546); Palmquist, 1938 (R. 195) to August 1940 (R. 505; see also R. 204, 540). Kuehn, 1938 (R. 257, 627) to December 1940 (R. 197–198, 493, 539, 542, 699; see also R. 195, 196, 205).

[33] "* * * and as to count 2 it must be proved that they were members after June 28, 1940, the date of the enactment of the statute involved in that count" (R. 1166).

b. *The Party program and the petitioners' activities in support thereof constitute militant advocacy rather than mere passive prediction of the overthrow of the Government by force and violence.*—It is apparent that petitioners and the Party are not mere spectators to the unfolding of a course of predetermined events, but assume an active role in creating and advocating the creation of, and in preparing for, the situation in which they will resort to force and violence. For, it is asserted, "Genuine revolutionists always have been distinguished by the union of theory and practice on which Marx insisted so often; ideas, words and programs are nothing if not translated into the actions of men * * *. The concrete institution in which theory and practice, word and deed, programs and men fuse is the revolutionary party" (R. 807). So, "in the last analysis men make the revolution" and "* * * a program without the men willing to fight and die for it is not even worth arguing about" (R. 807).

The Party's path of action is reflected in its rejection of parties deemed less vehement and methods less vigorous. It considers it illusory to depend on legal and parliamentary means, or on the ballot (R. 1182, 1200, 1257), and participates in elective campaigns for the purpose of spreading its revolutionary propaganda (R. 1200). It breaks with centrism (R. 1192–1193), with

parties it terms "reformist" (R. 1194, 1197, 1198), and with the "reactionary" Third Communist International (R. 1191–1192, 1196). It will have no part in class collaboration (R. 1189, 1194, 1201), denounces the country's laws (R. 426, 724–725), and proposes to operate illegally (R. 448, 467–468). Included in its goal is the defeat and destruction of the police, the courts, the jails, and the army (R. 218, 263, 979, 1247). The party stands for direct mass action (R. 1199) and strives to lead the working class so that it will be ready to take the "road to power" at the proper time (R. 265, 735). The Party advises the workers to prepare for violence (R. 885), and by its agitation tries to organize them so as to accelerate the revolution (R. 868–869). Pointing out that "Action is on the order of the day now" (R. 637), it tries "to prepare the masses to utilize the war crisis for the overthrow of U. S. capitalism * * *" (R. 376–377, 766). Its position is one of "Uncompromising opposition to the imperialist war, not only in words but in action, and especially after the United States is in" (R. 713). "This is not labor's war. Labor's war, in every country, is against the war makers, against Roosevelt as well as Hitler * * *" (R. 1063). Therefore, the Party carries on its basic task by explaining to workers the "irreconcilability" of class interests and by propagating the unity of workers in warring and neutral coun-

tries (R. 707–708). It pointed to the leading part played by the Trotskyist Group in taking over control of the City of Minneapolis and driving the police from its streets in 1934, as an example of what might be expected of it (R. 271, 272, 373, 374, 768, 988–989). The Party considers that there cannot be a successful revolution without a party, such as it is, "capable of leading and organizing the movement of the workers in a resolute fashion for a revolutionary solution of the crisis" (R. 876).

The language used by petitioners and found in the Party literature is of an inflammatory character and of general application, unmarked by any apparent distinction between advocating and predicting violence, and in its ordinary sense imports the teaching, advising, and advocating of the forcible overthrow of the Government at an opportune time. Perhaps no words were more frequently uttered or printed than "revolution," "conquest," "overthrow," "civil war," "violence," "use of arms," "military means" and "destruction."[34] Equally inflammatory language is found in writings and speeches sponsored by the

[34] See, e. g., R. 218, 219, 220, 222, 223, 224, 225, 226, 227, 229, 230, 234, 262, 263, 264, 265, 266, 275, 318, 319, 344, 345–346, 352, 618, 619, 621, 634–635, 636, 637, 639, 703, 704, 709, 719, 721, 725, 728, 731, 735, 766, 778, 793, 794, 795, 796, 807, 808, 821, 979, 986, 1084, 1087.

[35] See R. 217, 219, 235, 264, 265, 275, 318, 589, 703, 707, 721, 725, 731, 793–796, 805.

Party [35] and used at Party meetings. In sum, it was stated that use of the ballot was futile, there was to be an armed uprising, and armed overthrow of the Government was necessary (R. 257–258, 492; see also, e. g. R. 276, 284, 403–404, 476, 485, 492, 548, 599, 614, 743, 746, 759–760); the violent Russian Revolution was the example to follow (R. 656); frontiers would be crossed rather than await placidly the enemy's attack (R. 375); the Union Defense Guard was a militia for the Party though masquerading under the pretense of fighting fascism or the Silver Shirts (R. 491, 763–764); and power should be obtained through the use of guns (R. 477, 483, 484).

The tribunals below justifiably found it impossible to believe that petitioners themselves, let alone those to whom such language was directed, drew from it the metaphysical distinction between advocacy and prediction for which petitioners now contend, or interpreted it as anything but militant advocacy of the forcible overthrow of the Government. The jury's finding, based as it was upon a full and correct charge, must be deemed conclusive of their purpose. Cf. *Antolish* v. *Paul,* 283 Fed. 957, 959 (C. C. A. 7); *Kenmotsu* v. *Nagle,* 44 F. (2d) 953, 955 (C. C. A. 9); certiorari denied, 283 U. S. 832; *United States ex rel. Abern* v. *Wallis,* 268 Fed. 413, 414 (S. D. N. Y.)

c. *Evidence of advocacy of insubordination in the armed forces.*—Petitioners' contention that the

evidence is insufficient to support the verdict with reference to that portion of Count 2 of the indictment charging conspiracy to cause insubordination in the armed forces (Pet. 21–23) is equally without merit. The evidence is not confined, as petitioners contend (Pet. 22), to hypothetical conjectures as to future action by the Party dependent upon the occurrence of uncertain events, but establishes that petitioners and the Party advised military insubordination and that petitioners knew the Party so advised.

The Party regards it as essential to the achievement of its goal that it "destroy" "in particular the army" of the capitalist ruling class (R. 979, 1084). It states clearly the program and activities which it follows to that end:

> The exploited workers have no love for their bosses, in or out of uniform. * * * But the Marxists, accepting the reality of military training, try to utilize this for socialist purposes. The workers must be taught to follow their own class interests, in the army as in the factory. At every stage the revolutionary party strives to direct the class so that at the proper time the class is ready to take the road to power. Thus at the beginning of the war, Marxists call for military training not under the capitalist officer caste but under the control of their trade unions. (R. 1085.)

Adopting a program of infiltration into the military services (R. 565), the Party calls for abolition

of the "open shop" in the army (R. 711–712,[36] 806) and advocates trade-union control of military training (R. 620. 816[37]). Its military police puts the Party directly within the army while carrying on its program of disintegration:

> How do we work in a conscript army? someone asked. We work the same as in a shop. * * * The masses are in the army * * *. We go in and defend the interests of the slaves of military exploitation * * *. (R. 619.)[38]

The Party and its members are cautioned to "be with the masses, just as the Bolsheviks were in Kerensky's army" (R. 619).[39] Once in the army, advantage is to be taken of its training "in order to prepare to take over the power from the capitalist war makers" (R. 618).[40]

The Party has as its slogan, "Turn the imperialist war into civil war" (R. 719). It calls for the fraternization "of soldiers with soldiers on the opposite side of the battle front" and carries on "constant, persistent, tireless preparation of the revolution— * * * in the bar-

[36] From *Labor's Answer to Conscription* by petitioner Morrow.

[37] Admission by counsel for all of petitioners (R. 816).

[38] From speech by petitioner Cannon printed in the *Socialist Appeal*, October 26, 1940.

[39] *Ibid.*

[40] From radio speech by petitioner Carlson as candidate of the Party for United States Senator, printed in the *Socialist Appeal*, October 26, 1940.

racks, at the front and in the fleet" (R. 621, 708, 805–806, 986). And its aim is to "teach the armed workers to turn their guns not against their fellow workers in the opposite trenches but against their enemy at home" (R. 731).

The Party's advocacy and program of inciting to rebellion in the armed forces was put in action by some of its leading members, petitioners here, who: (1) Urged maintenance of contact with draftees to keep them advised of the Party program (R. 277–278, 280, 458);[41] (2) solicited an ex-serviceman to agitate at his former army post (R. 494);[42] (3) said that the Selective Service Act, if adopted, would furnish the Party an opportunity to spread dissension, dissatisfaction, and misunderstandings in the army (R. 515);[43] (4) before passage of the Act, said that Party members would go into the army in event of war and do the work of the Party there and would have guns to turn on the Government when the time came (R. 688);[44] (5) told a man, who subsequently registered under the Act, that after induction Party members should form cliques, "kick" about anything possible, and create newspaper publicity adverse to the army (R. 741);[45]

[41] Petitioner Dunne.
[42] Petitioners Geldman, Kuehn, Coover, and Palmquist.
[43] Petitioner Palmquist in presence of petitioner Geldman.
[44] Petitioner Hudson.
[45] Petitioner Dunne.

and (6) after passage of the Act, told a man subject to the draft to work for the Party in the army by "kicking" about the food and beds (R. 685–686).[46] Moreover, at Party meetings it was pointed out that drafted workers would be dissatisfied and that it would be easy for the Party to create dissension in the ranks and cause the soldiers' guns to be turned against their officers (R. 543).[47]

CONCLUSION

Petitioners had a fair trial, the jury was properly instructed, and the verdict is supported by the evidence. Review by the court below was thoroughgoing. In the context of the case, the constitutional issue is limited in scope and was properly decided. Because of the importance of the interests involved, it has seemed desirable to set forth at some length

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[46] Petitioner Dunne.

[47] It appears that petitioners Kuehn, Geldman, Cooper, Dunne, Skoglund, Coover, Schoenfeld, Hansen, Hamel, and proably Dodds (R. 542), all took part in these Party meetings (R. 543). Any ambiguity in this witness' testimony as to the presence of these appellants at the particular meeting must be resolved in favor of the Government. Cf. *Glasser* v. *United States*, 315 U. S. 60, 80. As the court below held (R. 1328), each coconspirator is responsible for what is said or done by other members to effectuate the purpose of the conspiracy. We submit that in view of the evidence of the Party's program for causing dissension and insubordination in the armed forces, and the activities of the defendants in furtherance thereof, the verdict is amply sustained as to all of the petitioners with respect to this portion of Count 2.

an analysis of the issues and evidence to aid in judging the necessity of further review.

Respectfully submitted.

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(21)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 431

VINCENT RAYMOND DUNNE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.
ARTHUR GARFIELD HAYS,
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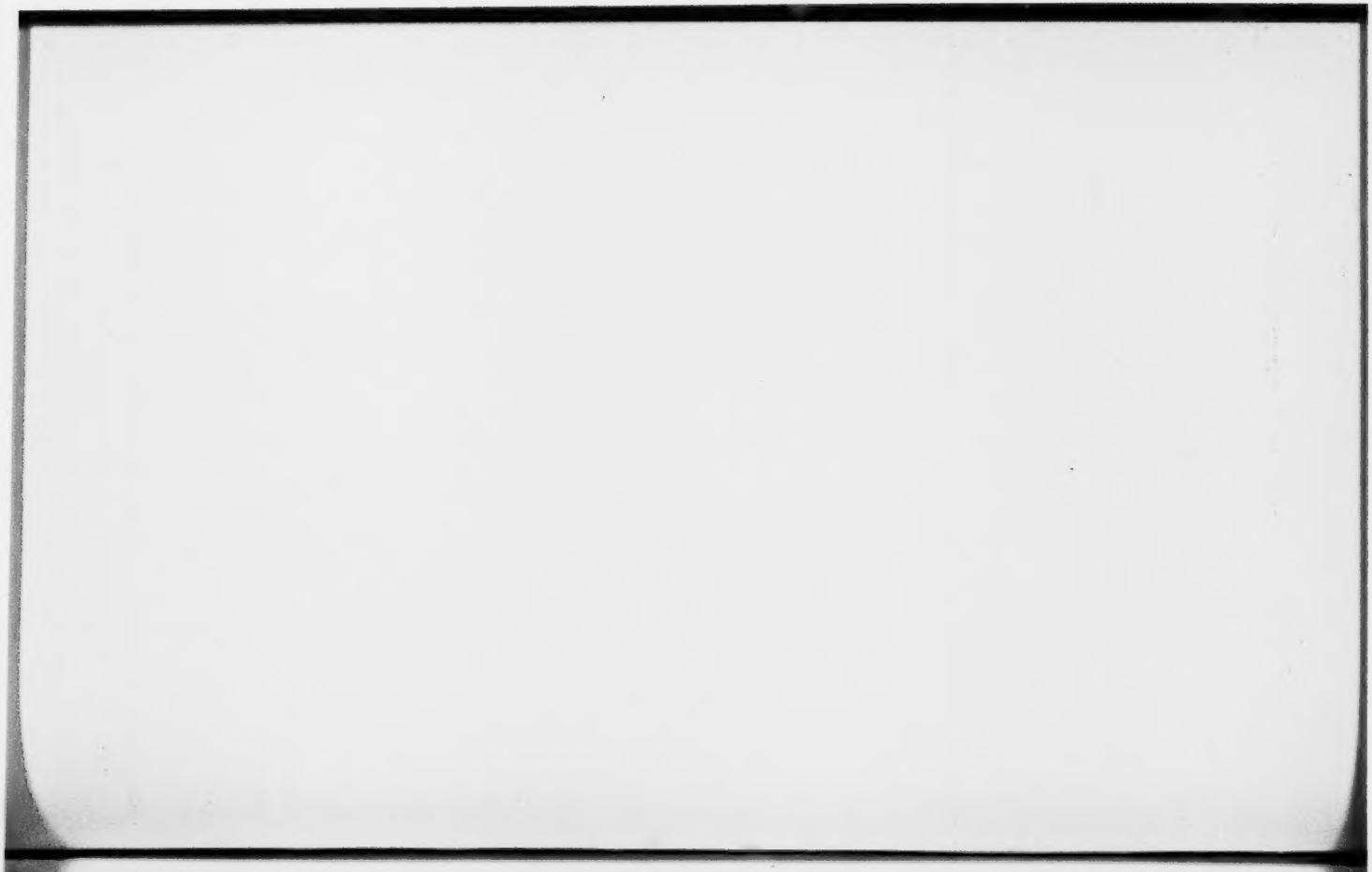
CLIFFORD FORSTER,
Of the New York Bar.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 431

VINCENT RAYMOND DUNNE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

The American Civil Liberties Union as *amicus curiae* joins in this extraordinary request and respectfully urges this Court to reconsider its denial of the application for a writ of certiorari to the United States Circuit Court of Appeals, Eighth Circuit, to review a judgment of conviction of the petitioners under the 1940 Alien Registration Act because:

1. This Court has never ruled upon the validity of a federal peacetime sedition statute;

2. The 1940 Alien Registration Act as a peacetime sedition law violates the first amendment to the United States Constitution;

3. The denial of certiorari can only cause confusion among the members of the bar and the general public, since the decision of the Court below rejecting the rule in

Schenck v. *United States,* 247 U. S. 47, and relying upon the rule in *Gitlow* v. *New York,* 268 U. S. 612, appears to be in conflict with several recent opinions of this Court.

I

In 1798 Congress passed the Federal Alien and Sedition Act. Before the Alien Registration Act of 1940 this was the only peacetime sedition law in the history of the United States. At no previous time has this Court either had an opportunity or has ruled upon such a statute. The opposition of many of the leading statesmen of the United States to the 1798 Acts is a matter of public record. No more succinct statement as to the validity of those acts exists than the statement of Thomas Jefferson that these acts were "* * * an experiment of the American mind to see how far it will bear an avowed violation of the Constitution." Letter, Jefferson to S. T. Mason, October 11, 1798, from Beveridge, *The Life of John Marshall,* vol. 2, page 384.

Under these circumstances it becomes imperative that this Court express its opinion as to the validity of the present peacetime sedition statute to act as a guide.

II

The 1940 Alien Registration Act on its face violates the first amendment to the United States Constitution. This amendment is a prohibition upon the powers of Congress to enact any legislation which abridges the freedom of speech. It may well be that the war power of Congress will override certain limitations upon the powers of Congress—the *Schenck* case upheld the 1917 Federal Espionage Act. But this statute enacted in June 28, 1940 was a peacetime measure intended to be applied in peace-

time and will be effective after this war has been brought to a successful conclusion. The war power of Congress cannot be held to be so extended as to override such an abridgement of the first amendment in time of peace.

In cases involving a deprivation by statute of civil liberties, the presumption of constitutionality does not apply. *Schneider* v. *State,* 308 U. S. 147, 161, and *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, N. 4. Furthermore the statute is vague, indefinite and uncertain. It cannot be claimed that a person is appraised with any assurance as to exactly what language would fall within the purview of the act and subject the utterer to the severe penalties provided for. We believe it sound constitutional doctrine that where there is any doubt as to the extent and meaning of a federal statute attacked under the first amendment, such doubt shall be resolved against the government. See *Herndon* v. *Lowery,* 301 U. S. 242.

III

The court below based its opinion upon the rule in the *Gitlow* case and said, "* * * The nation * * * may * * * punish *utterances* which have a *tendency* to and are intended to produce the forbidden results * * *" 138 Fed. 2nd at 145. (Emphasis supplied.) Furthermore, the Circuit Court rejected as inapplicable the rule of the *Schenck* case, wherein this court set forth its formula that the question is "* * * whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils * * *".

The Gitlow formula is divided into two parts:

A. A presumption of validity extends to legislative enactments setting forth a substantive evil, and utterances coming within that prohibition are punishable (*Gitlow* case, pp. 668, 670).

To uphold uncritically such a contention would in effect destroy the guaranty of freedom of speech set forth in the first amendment to the Federal Constitution. As we have said above, this court recognized the validity of this argument in *Schneider* v. *State*, 308 U. S. 147, 161. Referring to the right of freedom of speech the court there stated that the "phrase is not an empty one and was not lightly used. * * * It stressed, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgement of these rights is asserted the courts should be astute to examine the effects of the challenged legislation." See also, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, N. 4.

The court below (p. 140) cites this important principal enunciated by this court but fails to realize its implications upon the *Gitlow* case.

B. Where the legislature sets a standard of substantive evil, *utterances* coming within that standard *tending* to produce that evil are punishable (*Gitlow* case, p. 667). (Emphasis supplied.)

But in *Herndon* v. *Lowry*, 301 U. S. 242, this court said at page 258 "* * * the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon the individual must have

appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution.''

Thus the utterances must more than *tend* to produce a substantive evil, they must create a "reasonable apprehension of danger to organized government." It should be noted at this point, that the jury refused to convict petitioners of any overt act; the government's evidence being only that they had purchased four rifles and formed a union defense guard.[1]

While accepting the Gitlow formula the Court below rejected specifically the applicability of the clear and present danger rule laid down in the *Schenck* case. It recognized a similarity between the 1940 Alien Registration Act and the 1917 statute upheld in the *Schenck* and similar cases, and said although these cases do not rule the present case yet "* * * it does not follow that those cases contain no expressions which are useful guides for determining the character of questions presented here * * *" (p. 140). Withal, the Circuit Court saw fit to reject completely the Schenck formula in favor of the Gitlow formula (p. 145).

This Court, however, recently in *Schneiderman* v. *U. S.*, 320 U. S. 118, at 157, convincingly set forth the enlarged applicability of the clear and present danger rule.

"There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and *mere doctrinal justification* or prediction of the use of force under hypothetical conditions at some indefinite future time-predication that is not calcu-

1. Compare the action of the Supreme Court in *Fiske* v. *Kansas*, 274 U. S. 380, where literature of the IWW, similar in content to that involved here, was held protected by freedom of speech, and the Kansas Criminal Syndacalism Statute accordingly invalid as applied.

lated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason." (Emphasis supplied.) The Court cited *Bridges* v. *California,* 314 U. S. 252, the concurring opinion of Justice Brandeis in *Whitney* v. *California,* 274 U. S. 357, 372-280, and *Taylor* v. *Mississippi,* 319 U. S. 583.

In the *Bridges* case this Court said (p. 262): "* * * the 'clear and present danger' language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under Espionage Acts, *Schenck* v. *U. S., supra; Abrams* v. *U. S.,* 250 U. S. 616; under a Criminal Syndicalism Act, *Whitney* v. *California, supra;* under an 'Anti-Insurrection' Act, *Herndon* v. *Lowry, supra;* and for breach of the peace at common law, *Cantwell* v. *Connecticut, supra.* And very recently we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is 'destruction of life or property, or invasion of the right of privacy'. *Thornhill* v. *Alabama,* 310 U. S. 88, 105.

"Moreover, the likelihood however great, that a substantive evil will result cannot alone justify a restriction upon freedom of expression or the press."

In our opinion it is unreasonable in the extreme to claim or sustain the contention that the utterances charged against the petitioners could constitute a clear and present danger to the evils the statute purportedly is directed.

It is thus submitted that the opinion of the Court below is in conflict with opinions of this Court, and the refusal to review the case at bar will create confusion as to the status of the *Gitlow* and *Schenck* cases.

It is respectfully urged that this Court should grant the petition for certiorari prayed for.

Respectfully submitted,

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(22)

Supreme Court of the United States

OCTOBER 1943 TERM

No. 431

VINCENT RAYMOND DUNNE, JAMES P. CANNON, EDWARD PALMQUIST, MAX GELDMAN, OSCAR COOVER, EMIL HANSEN, ALFRED RUSSELL, GRACE CARLSON, HARRY DEBOER, FARRELL DOBBS, FELIX MORROW, KARL B. KUEHN, JAKE COOPER, CARLOS HUDSON, CARL SKOGLUND, ALBERT GOLDMAN, CLARENCE HAMEL and OSCAR SCHOENFELD,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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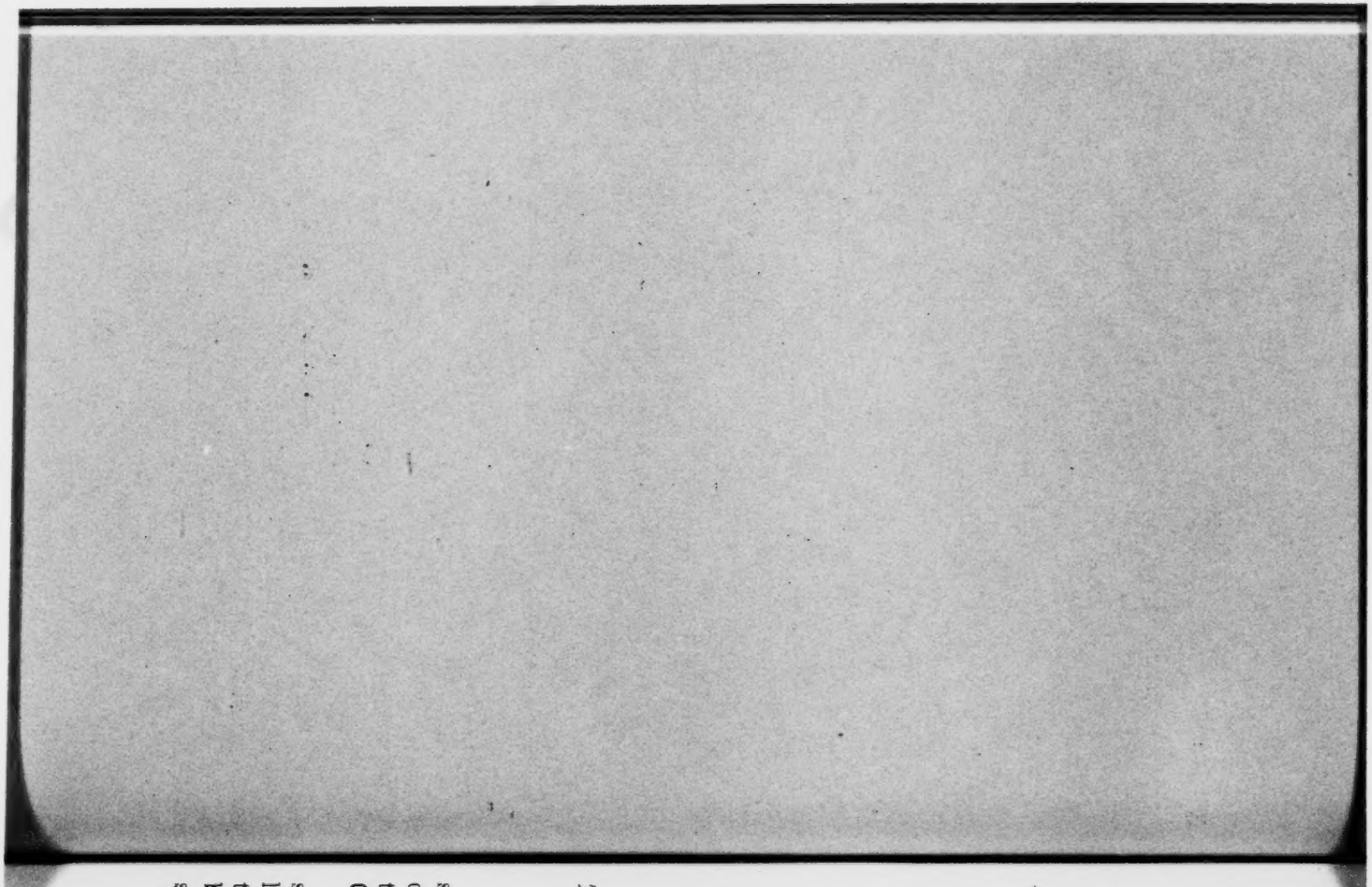

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Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray this Court to reconsider its determination made on November 22, 1943, which denied petitioners' application for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of conviction.

Your petitioners respectfully submit that there is presented in these cases a serious question of constitutional law which should be passed upon by this Court involving the Alien Registration Act of 1940, a question which is bound to arise in further prosecution under this statute or similar statutes.

This question is whether or not the clear and present danger test first enunciated by this Court in *Schenck* v. *United States,* 249 U. S. 47, is applicable to a prosecution for conspiring to advocate the overthrow of the Government by force and to advocate disaffection in the armed forces. This question has never before been considered by this Court in relation to an Act of Congress.

The First Amendment to the Constitution of the United States prohibits the Congress from passing any law that shall "abridge" freedom of speech or of the press. Nevertheless the statute now under consideration makes it a criminal offense to express certain opinions. This is the third time that Congress has enacted laws of this character.

The first time was in 1798, when fear of foreign propaganda resulted in the Alien and Sedition Act. This Court never had occasion to pass on the propriety of the numerous convictions had under that law. For that great believer in freedom, Thomas Jefferson, being of the opinion that the law was unconstitutional as well as unwise, pardoned the sufferers from its enforcement.

The second Congressional enactment was the Espionage Act of 1917, passed during wartime, and by its terms limited to wartime. That statute was upheld by this Court in the *Schenck* case supra. But in upholding the law, Justice Holmes stressed two safeguards: that the law applied only to wartime utterances, which might be such a hindrance to the war effort "that their utterance will not be endured so long as men fight", and that the utterances could be punished only when they "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent".

The third instance is the statute involved in the case at bar. This Court, by refusing to review these convictions, has, in effect, approved that statute as here applied. And it has approved it, though both the safeguards stressed by Justice Holmes in the *Schenck* case are here absent. Not

only is the statute itself applicable in peacetime, but the utterances which form the basis of the charge against petitioners were peacetime utterances. Moreover, the Trial Court refused to apply to this case the clear and present danger rule enunciated by Justice Holmes, despite motions at the trial and requests for instructions to the jury which properly raised that issue.

This result is the more remarkable and difficult to understand because this Court has so recently described the clear and present danger rule as the "minimum" constitutional guaranty (*Bridges* v. *California*, 314 U. S. 252) and has cited the rule with approval in many recent free speech cases. (See *Thornhill* v. *Alabama*, 310 U. S. 88, 105; *Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *Schneiderman* v. *United States*, 319 U. S. ; *Taylor* v. *Mississippi*, 319 U. S. .) Moreover, the rule has been thought applicable to cases not dissimilar to the one at bar by two State appellate courts (*Klapprott* v. *State*, 127 N. J. Law 395; *Shaw* v. *State*, Okla. , 134 P. 2nd 999).

The courts below relied on the decisions of this Court that State criminal syndicalism laws are presumtively valid (*Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357). That was the only contention made by the Government both at the trial and in the Circuit Court. We do not dispute that weight must be given to the legislative determination that certain words may be harmful.

Nevertheless, we submit that constitutional protection of freedom of speech cannot be preserved unless a defendant in a particular case can show that the legislative determination did not apply; in other words, that there was no clear and present danger in his case of the happening of the substantive evil aimed at. That was the view taken by Justices Holmes and Brandeis concurring in the *Whitney* case. No one has ever answered the logic and common sense of what Mr. Justice Brandeis there said:

> "Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must

> remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."

In this Court the Government has raised an entirely different point, namely, that the clear and present danger rule is never applicable to any statute affecting free speech, no matter how stringent it may be, provided that the statute required a finding that there was an intent to produce the substantive evid aimed at. In other words, by the mere insertion of the words "with intent", the constitutional protection of freedom of speech can be destroyed. It would make no difference under what circumstances nor at what remote time the accused person may have intended that his words should ripen into action. This Court has never heretofore sanctioned such a result. We can hardly believe that the quotation from the *Taylor* case contained in the Government's brief (p. 19) intended to establish so far reaching a consequence. If so, then for all practical purposes the clear and present danger rule is dead, unless perchance it have some vague ghostly life to be invoked by a formula not yet discovered by counsel.

In arguing that the clear and present danger rule is not applicable to this statute because of the insertion of the word "intent", the Government overlooks the fact that in effect the Espionage Act is the same. For the Espionage Act in all of the three subdivisions of its vital third section punishes acts only when "wilfully" done (see 50 U. S. C. A. 33). An act wilfully done is necessarily an act done with intent to produce the evil against which the statute is designed. As this Court held in *United States* v. *Murdock*, 290 U. S. 389, a defendant prosecuted under a statute which punished a wilful act is entitled to an instruction with regard to his intent. It seems to us to be merely a play on words to say that there is any substantial difference between a statute which punishes a person who says

or does something wilfully and one which punishes a person because he says or does something with intent that harm shall result. So, in effect, this case is the same as the *Schenck* case, unless this Court should reject the view of Justices Holmes and Brandeis that the presumption arising from the legislative determination is rebuttable.

The Court's refusal to review the case at bar thus leaves it uncertain whether the rule of the *Gitlow* and *Whitney* cases determines the result, as was urged by the Government in the Court below, or whether the result was reached on the basis of the Government's argument here, because the statute contained the word "intent". It is difficult to believe that this Court should have reached either conclusion without hearing full argument on a subject of such far-reaching importance. We respectfully suggest that even if this Court may have made up its mind beyond the possibility of change after argument, it is, nevertheless, in the public interest that the Court's reasons for its conclusions be stated. Otherwise neither the bench nor the bar nor the public can know what is the proper rule in such cases.

We therefore respectfully submit that a rehearing should be granted and the determination of this Court denying the application for writ of certiorari be set aside and a writ granted to review the judgment of conviction.

Osmond K. Fraenkel,
Albert Goldman,
Counsel for Petitioners.

Dated, December 1, 1943.

(23)

Supreme Court of the United States

OCTOBER 1943 TERM

No. 431

VINCENT RAYMOND DUNNE, JAMES P. CANNON, EDWARD PALMQUIST, MAX GELDMAN, OSCAR COOVER, EMIL HANSEN, ALFRED RUSSELL, GRACE CARLSON, HARRY DEBOER, FARRELL DOBBS, FELIX MORROW, KARL B. KUEHN, JAKE COOPER, CARLOS HUDSON, CARL SKOGLUND, ALBERT GOLDMAN, CLARENCE HAMEL and OSCAR SCHOENFELD,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

SECOND PETITION FOR REHEARING

OSMOND K. FRAENKEL,
ALBERT GOLDMAN,
Attorneys for Petitioners.

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SECOND PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Counsel would not importune the Court to consider this case further were it not that continued reflection cannot remove counsel's belief that petitioners' constitutional rights are being disposed of without adequate consideration of the same by this Court and without any such statement of the result as will enable the lower Federal courts properly to apply the law.

We, therefore, respectfully ask the Court's leave to permit the filing of this second petition for rehearing. With regard to the desirability of rejecting the rule of the *Gitlow* and *Whitney* cases we have nothing to add to what we have already said.

We shall confine our discussion, therefore, to the point raised by the government for the first time in its brief in opposition to the original application for certiorari, namely, that the clear and present danger rule is not applicable to this case because the statute punishes advocacy only when uttered with an unlawful intent. This rule, if accepted by this Court, would be far reaching in its consequences. For it would apply not merely to a prosecution under a statute which, as in the case at bar, uses the word intent, but also to every prosecution for an attempt under any statute, no matter what its form. There may be substantive crimes lacking such intent but no attempt can occur without an intent. Thus a man may accidentally kill another, but he cannot accidentally attempt to kill another. So with regard to the particular case here in question, a man might accidentally cause obstruction to recruiting—that is to say, he might make a remark in a setting wholly unrelated to any desired effect upon recruiting, which might nevertheless produce an effect. But he could not accidentally attempt to cause obstruction to recruiting.

This philosophical identity between attempts and intent is important, for it establishes the identity between this case and the *Schenck* case, where the clear and present danger rule was first announced. For the prosecution in the *Schenck* case was essentially one for an attempt. The indictment charged a conspiracy to cause and to attempt to cause obstruction to recruiting, but there was no contention that actual obstruction to recuiting had resulted from the document sent out by the Socialist Party. Moreover, Mr. Justice Holmes expressly said in that case that "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying out of it." Yet Mr. Justice Holmes went on to say that speech could not constitutionally be punished except under circumstances of clear and present danger. The case might as well have been the case at bar.

While the government refers (brief in opposition p. 19) to a statement of Justice Holmes in the *Abrams* case, a careful reading of that opinion indicates no such definite conclusion of Justice Holmes as suggested by the government. For at page 627, shortly before the quotation relied upon by the government, Justice Holmes had thus described the power of Congress constitutionally to punish speech, namely, when "that produces or is intended to produce a clear and imminent danger that it would bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent". It will be noted that it was not the intention to produce the substantive evils that is there stressed, but the intention to create a situation of clear and present danger that such evils might result—quite a different issue than that here submitted to the jury (see R. 1164, 1165).

We submit, therefore, that to adopt the theory now advanced by the government would overrule the *Schenck* case and leave to the clear and present danger rule an application so limited as to be of no practical consequence whatever. We can hardly believe this Court intended such a result. On the other hand, if this Court intended to accept the reasoning of the Circuit Court of Appeals and applied the doctrine of the *Gitlow* and *Whitney* cases despite the unanswered contrary reasoning of Justices Holmes and Brandeis, then we think there should be a public statement to that effect for the guidance of the bench and bar.

We are the more moved to press again for a consideration of this case because we believe that the facts of the case show the injustice of the result reached. Here we have a case where defendants were charged both with conspiring to overthrow the government by force and with conspiring to advocate the overthrow of the government with intent that it be overthrown. It is difficult to draw a distinction between these two charges, for surely everything proved under the second might equally have been proved under the first. Yet the jury acquitted defendants of the first charge.

Defendants were charged also with having conspired to cause insubordination in the armed forces. This charge rests entirely (except perhaps as to certain petitioners) on the fact that defendants were members of the Socialist Workers Party, that prior to the enactment of the statute in question certain principles of the Socialist Workers Party might be interpreted as advocating such insubordination. There is no evidence in the record that the Party advocated insubordination in the armed forces subsequent to the enactment of the statute in question, nor except perhaps with regard to certain petitioners, any evidence that any of the petitioners so advocated. There is certainly no evidence of any conspiracy between them. Whatever inference might have been possible had this statute been of long standing, the presumption of innocence surely must overcome the presumption of continuity and the burden rested on the government to show a criminal design formed at a time when such design was criminal.

The matter relied upon by the government in its brief in opposition fails to meet the burden placed upon the government. The chief reliance of the government in its attempt to show that the Party advocated insubordination in the armed forces is a quotation contained in the brief on page 38. A reference to the record (1085) will show, however, that this quotation has been taken entirely out of context. It is evident that the policy there under discussion relate to the general policy of the Party with regard to a possible revolution, and was not in any way designed to interfere with the discipline of the army in the meantime. Thus the document goes on to say:

> "Workers will be more careful of their rights of their brothers entrusted to them. * * * Worker-soldiers must learn to defend proletarian democracy. Their training must be used to prevent the breaking up of working class meetings, of trade union meetings; to defend the working class press, etc. * * *"

It will be noted, moreover, that this is merely a short section in a long book which is concerned almost entirely with the transition from capitalism to socialism and only incidentally with the army. This is the only matter of any kind put out by the Party after the passage of the Alien Registration Act of 1940. We submit that it is entirely insufficient to form the basis of any charge of conspiracy. The other matter referred to by the government was put out before the enactment of the Smith Act and, moreover, consisted of individual, not Party, statements, or is wholly unobjectionable. The maxim "turn imperialist war into Civil War" came from a publication of April, 1939 (R. 719). The aim to teach the workers to turn their guns against their enemy at home comes (R. 731) from a publication of 1937 (R. 1003) and had not been circulated by the Party for some time prior to 1940 (R. 1003).

The alleged putting into action of the Party's program by various petitioners referred to on pages 40 and 41 of the brief gives an entirely improper and misleading picture. Thus the statement about soliciting an ex-serviceman to agitate at a former army post occurred in early 1939 (R. 494). The statement attributed to petitioner Hudson only that the workers should turn their guns on the different governments is not shown to have been made after the enactment of the Alien Registration Act. The reference (p. 41) to Party meetings at which it was pointed out that the Party could create dissension in the ranks also predates the enactment of the statute, because the witness said that he thought that the meetings took place in the early part of 1940 (R. 543). It is significant, moreover, that Bartlett, one of the important witnesses for the government (pp. 193-240, 250-330, 347-473), testified on cross-examination that petitioner Dunne "didn't tell me anything to the effect that I should join the army and create insubordination nor that I should advise others to join the army and create insubordination" (R. 458).

Whatever might have been the propriety of charging one or more individuals with attempting to cause disaffec-

tion in the armed forces because of statements made after the passage of the Alien Registration Act, there is no basis whatever for a finding that there was a conspiracy to this end to which all of the petitioners were parties.

In the interest of substantial justice and the elucidation of important constitutional principles, we, therefore, respectfully urge this Court to reconsider its previous denial of the application for certiorari and its previous denial of a rehearing.

This application is made in good faith and not for the purpose of delay.

Respectfully submitted,

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